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Job Reference Immunity Statutes: Prevalent But Irrelevant

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JOB REFERENCE IMMUNITY STATUTES: PREVALENT BUT IRRELEVANT

*Markita D. Cooper**

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INTRODUCTION

Job seekers and employers know the influential role that references can play in the hiring process. Traditionally, reference checking is one of the final steps in screening job applicants, taken just before a prospective employer extends a job offer to a candidate. A positive reference assists the employer in confirming a candidate's qualifications, skills, and talents. A negative, ambivalent, or lackluster reference can torpedo an otherwise promising candidacy, or at the very least, lead a prospective employer to entertain serious reservations about hiring the applicant. Reliable and detailed references provide useful information, thus employers generally view references as a valuable part of the hiring process.[1]

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[1] *See, e.g.*, Terry Ann Halbert & Lewis Maltby, *Reference Check Gridlock: A Proposal for Escape*, 2 EMPLOYEE RTS. & EMP. POL'Y J. 395, 400-01 (1998) (discussing various methods for obtaining information regarding prospective employees, and noting that "there can be no substitute for learning how an employee handled previous jobs. Without this information, employers make costly mistakes."); Ramona L. Paetzold & Steven L. Willborn, *Employer (Ir)rationality and the Demise of Employment References*, 30 AM. BUS. L.J. 123, 124 (1992) (discussing the value of references in the selection process and noting that employment references are "used to verify information given by the job applicants themselves, to help the employer predict performance or job success of job applicants, and to provide other important information that may not be revealed by other sources."); Bradley Saxton, *Flaws in the Laws Governing Employment References: Problems of "Overdeterrence" and a Proposal for Reform*, 13 YALE L. & POL'Y REV. 45, 50 and n.15 (1995); *Probing Questions Are Necessary When Checking References*, HR REPORTER, Aug. 1996, at 2 (noting that although employers are cautious about providing references, "all other things being equal, references can determine whom you hire").

Surveys also indicate that employers value references in the hiring process. *See, e.g.*, SOCIETY FOR HUMAN RESOURCE MANAGEMENT REFERENCE CHECKING SURVEY (1998) at 5 [hereinafter SHRM 1998 Survey] (reporting that more than 80% of respondents regularly check references of candidates for professional (89%), executive (85%), administrative (84%) and technical positions (81%); 68% regularly checked references of applicants for skilled labor positions; and 57% regularly checked references of applicants for part-time positions); Colleen D. Ball, *Job Reference Risks: Candor vs. Slander*, USA TODAY, May 3, 1999, at 15A (reporting survey results from the Baltimore Business Journal in which 90% of responding employers attempted to obtain references regarding prospective employees). While conventional wisdom

While job applicants' resumes may state that references are "available upon request," many employers routinely refuse to comply with these requests. Increasingly, prospective employers who seek references encounter company policies which either prohibit provision of references or limit provision to information such as job title, dates of employment and salary history.[2] Such "no comment" and "name, rank and serial number" policies are now the standards for many businesses, in stark contrast to previous practices in which job references were freely available.[3]

What precipitated this shift in job reference practices? Increasing concern regarding the risk of being sued prompted many employers to reexamine their job reference practices in light of a series of highly publicized defamation verdicts in the 1980s.[4] Publicity surrounding these

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views references as useful components of the screening process, not everyone agrees. For example, some of the human resources professionals interviewed by Halbert and Maltby questioned the value of references. Halbert & Maltby, *supra* note 1, at 396-97.

[2] A number of commentators have discussed the trend toward limited reference policies. *See, e.g.*, Valerie L. Acoff, Note, *References Available Upon Request . . . Not! – Employers Are Being Sued for Providing Employee Job References*, 17 AM. J. TRIAL ADVOC. 755 (1994); Robert S. Adler & Ellen R. Peirce, *Encouraging Employers to Abandon Their "No Comment" Policies Regarding Job References: A Reform Proposal*, 53 WASH. & LEE L. REV. 1381 (1996); Markita D. Cooper, *Beyond Name, Rank and Serial Number: "No Comment" Job Reference Policies, Violent Employees and the Need for Disclosure-Shield Legislation*, 5 VA. J. SOC. POL'Y & L. 287 (1998); Paetzold & Willborn, *supra* note 1; Saxton, *supra* note 1; J. Hoult Verkerke, *Legal Regulation of Employment Reference Practices*, 65 U. CHI. L. REV. 115 (1998); David Grant, *Giving a Reference: Just Name, Rank, and Salary History?*, LEGAL TIMES, Nov. 30, 1987, at 16. Surveys of managers and human resource professionals also provide evidence of this trend. *See, e.g.*, SHRM 1998 Survey, *supra* note 1, at 8-9 (finding 76% of employers surveyed provide references when requested; however, the information provided is general, such as dates of employment, eligibility for rehire, and salary history. Respondents typically decline to comment when prospective employers seek more in-depth reference information); *FYI Strictly Limited*, MINNEAPOLIS STAR TRIBUNE, Jan. 5, 1999, at 1D (finding 74% of respondents surveyed by the staffing firm Accountemps verified only names, dates of hire and salary).

[3] *See, e.g.*, Charles D. Tiefer, Comment, *Qualified Privilege to Defame Employees and Credit Applicants*, 12 HARV. C.R.-C.L. L. REV 143, 146 (1977) (observing that "the number of employer references . . . has increased dramatically. References for former employees are now written by the millions"); Deborah S. Kleiner, *Is Silence Truly Golden?*, H.R. MAG., July 1993, at 117 (noting previous practices in which "references were given on an ad hoc basis"); James W. Fenton, Jr. & Kay W. Lawrimore, *Employment Reference Checking, Firm Size, and Defamation Liability*, J. SMALL BUS. MGMT., Oct. 1992, at 88 (describing routine reference checks as "a time-honored ritual of employers"); Grant, *supra* note 2, at 16 ("It has been traditional in the American workplace for employers to request and provide employee job references.").

[4] Sigal Constr. Corp. v. Stanbury, 586 A.2d 1204, 1206 (D.C. 1991) (relating that a reference regarding a project manager stated he was "detail oriented to the point of losing sight of the big picture," that "[w]ith a large staff [he] might be a very competent . . . [project manager]." The manager providing the reference also stated, "[o]bviously he no longer worked for us and that might say enough"); *see, e.g.*, Frank B. Hall & Co. v. Buck, 678 S.W.2d 612, 617 (Tex. App. 1984) (awarding $1.9 million to plaintiff whose former managers described as "untrustworthy," "untruthful," "disruptive, paranoid, hostile . . . guilty of padding

verdicts focused employers' attention on workplace defamation liability. As legal scholars, journalists and other observers of workplace trends noted large jury verdicts in job reference cases,[5] employers adopted increasingly cautious approaches toward providing references. By the mid-1990s, the "name, rank and serial number" reference had become the preferred and advised policy for the litigation-wary employer.[6] The trend away from substantive references endures, notwithstanding empirical research demonstrating that the actual number of reference-based def-

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his expense account," "irrational, ruthless," "disliked by office personnel," "a classical sociopath," "a zero," and a "Jeckyll and Hyde person" who lacked "compucture [sic] or scruples")(internal quotations omitted).

[5] *See, e.g.*, Fenton & Lawrimore, *supra* note 3, at 88; Roger B. Jacobs, *Defamation and Negligence in the Workplace*, LAB. L.J. (Sept. 1989) 567, 571 (noting that "[s]ince 1980 there have been forty libel awards in excess of one million dollars"); John Bruce Lewis et al., *Defamation and the Workplace: A Survey of the Law and Proposals for Reform*, 54 MO. L. REV. 797, 798 (observing that in workplace defamation cases, "[v]erdicts of more than $1 million . . . are not unusual and some verdicts have reached as high as $6 million"); Robert A. Prentice & Brenda J. Winslett, *Employee References: Will a "No Comment" Policy Protect Employers Against Liability for Defamation?*, 25 AM. BUS. L.J. 207, 208-09 (discussing increasing number of workplace defamation cases and noting that some cases resulted in "quite substantial" judgments); Jeff B. Copeland et al., *The Revenge of the Fired*, NEWSWEEK, Feb. 16, 1987, at 46; Martha Middleton, *Employers Face Upsurge in Suits Over Defamation*, NAT'L L.J., May 4, 1987, at 1; Kleiner, *supra* note 3, at 117; Tamar Lewin, *Boss Can be Sued for Saying Too Much*, N.Y. TIMES, Nov. 27, 1987, at B26; *Workers Refused Jobs Due to Bad References Winning Suits Against Ex-Employers, Lawyer Says*, 64 Daily Lab. Rep. (BNA) A-3, (Apr. 3, 1990).

[6] *See, e.g.*, Cooper, *supra* note 2, at 292-97; JAMES G. FRIERSON, PREVENTING EMPLOYMENT LAWSUITS: AN EMPLOYER'S GUIDE TO HIRING, DISCIPLINE, AND DISCHARGE 229-30 (BNA 1994) (noting a "significant trend" since the 1980s of employers refusing to give references or providing only job title and duration of employment in response to reference requests); Robert Half Int'l, Inc, *Survey Shows Employers Find it Harder to Check References* (Jan. 1993) (survey of 200 Fortune 1000 executives); News Release, Society for Human Resource Management, *Reference Checking Leaves Employers in the Dark: Legal Concerns a Stumbling Block, SHRM Survey Says* (June 26, 1995) (news release published by Society for Human Resource Management [hereinafter "SHRM"] reporting survey findings in 1995). In its 1995 survey, SHRM reported that 63% of respondents reported that, fearing lawsuits, their companies refused to provide information regarding former employees." More recent surveys echo these concerns. *See, e.g.*, SHRM 1998 Survey, *supra* note 1, at 9-10 (reporting that although most respondents stated that their organizations had not encountered any legal actions as a result of providing references, 45% said that fear of suit prompted refusal to provide references); *FYI Strictly Limited*, MINNEAPOLIS STAR TRIBUNE, Jan. 5, 1999, at 1D (74% of respondents surveyed by the staffing firm Accountemps verified only names, dates of hire and salary history). Human resource management texts also advocate the cautious "name, rank and serial number" approach. *See, e.g.*, CLIFF ROBERSON, HIRE RIGHT/FIRE RIGHT: A MANAGER'S GUIDE TO EMPLOYMENT PRACTICES THAT AVOID LAWSUITS 39 (1992) (advising employers that "[t]he safest policy . . . is to provide only a statement of fact that the former employee was employed from . . . to . . . without any comment regarding the quality of the employment or whether or not the individual was fired or left voluntarily); STEVEN MITCHELL SACK, FROM HIRING TO FIRING: THE LEGAL SURVIVAL GUIDE FOR EMPLOYERS IN THE 90'S 297, 305 (1995) (cautioning employers to "[a]dopt a policy of simply confirming the facts of employment, dates, duties and positions held" and to "[a]void giving negative references to prospective employers.").

amation claims is small, with plaintiffs prevailing in only a fraction of those cases.[7]

Employers' concerns are not limited to the possibility of being sued for defamation by former employees. In some cases, plaintiffs sued employers for misrepresentation based on positive references. In those cases, employers gave positive references without disclosing information regarding dangerous behavior by the employees.[8] Although employers have no legal duty to provide references, one who chooses to give a reference may be liable for misrepresentation if he or she provides incomplete or misleading information.[9] The misrepresentation theory provides an additional ground for employers to refrain from giving references.[10]

Problems may also arise when employers provide positive references for some employees while not providing references for others. For "name, rank and serial number" policies to work most effectively as deterrents to litigation, employers must consistently refrain from providing

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[7] Based on a survey of reported workplace defamation cases between 1965-1970 and 1985-1990, Professors Paetzold and Willborn concluded that the relative number of defamation claims has not increased, employees seldom recover, and the size of recoveries has declined. *See* Paetzold & Willborn, *supra* note 1, at 124. Paetzold and Willborn found that the number of reference-based defamation cases was four from 1965-1970 and twelve from 1985-1990, with employers losing 25% of the cases. *Id.* at 136-39. Updating this review of defamation cases in 1997, Halbert and Maltby found only 13 reported cases in 1997, with plaintiffs prevailing in four of the cases. In addition, Halbert and Maltby noted that "a plaintiff's award of damages was upheld just once" and "[p]laintiffs failed to survive summary judgment in six of [the thirteen] cases." *Id.* at 404 and n.29.

[8] *See, e.g.*, Davis v. Bd. of County Comm'rs, 987 P.2d 1172 (N.M. Ct. App. 1999); Randi W. v. Muroc Joint Unified Sch. Dist., 929 P.2d 582 (Cal. 1997) (unqualified, glowing reference given to school principal who had been accused of molesting students); Jerner v. Allstate (Fla. Cir. Ct. 1995) (No 93-09472) (employee who was fired after engaging in violent and bizarre conduct in the workplace received a recommendation letter stating that he had "voluntarily resigned" due to a restructuring and concluding that "[t]his action is in no way a reflection upon [his] job performance"; employee later went on a shooting rampage after being fired from the employer who had received the misleading recommendation). Allstate settled the *Jerner* case in 1995. *Allstate Settles Suit on Reference for Killer*, NAT'L L.J., Oct. 16, 1995, at B2.

[9] *Randi W.*, 929 P.2d at 592-93 (emphasizing the affirmative nature of the alleged misrepresentations in the case and that mere failure to disclose alone would not be grounds for a claim against the employer); Gutzan v. Altair Airlines, Inc., 766 F.2d 135, 141 (3d Cir. 1985) (allowing plaintiff recovery on negligent misrepresentation theory where temporary agency represented that it had verified employee's fabricated explanation of facts surrounding rape conviction). *See also* Anthony J. Sperber, Comment, *When Nondisclosure Becomes Misrepresentation: Shaping Employer Liability for Incomplete Job References*, 32 U.S.F. L. REV. 405 (1998).

[10] *See* Bradley Saxton, *Employment References in California After Randi W. v. Muroc Joint Unified School District: A Proposal for Legislation to Promote Responsible Employment Reference Practices*, 18 BERKELEY J. EMP. & LAB. L. 240, 265 (1997) (arguing that the existing legal rules of no duty to disclose but potential misrepresentation liability when employers provide information "should persuade many cautious employers to resort to 'no-comment' reference strategies").

references. An employee who receives either no reference or a "name, rank and serial number" reference while other employees received more complete or informative references may argue that the limited reference constitutes unfair treatment by the employer.[11] In short, reference practices can trap the cautious employer as well as the unwary one. Consequently, we should not be surprised that today's conventional wisdom regarding job references echoes a familiar maxim: "silence is golden."

Recognizing the connection between fear of litigation and the proliferation of no-reference policies, legislators and human resource management lobbyists have pressed for statutes to immunize employers from liability arising out of job references.[12] The goal of these statutes is to encourage employers to provide references, based on the expectation that qualified immunity in reference-based lawsuits will reduce employers' fears of being sued.[13]

This Article posits that current reference immunity statutes are of little use in encouraging employers to provide references. Moreover, many of the statutes muddle, rather than clarify, the legal standards regarding potential liability or immunity, and many employers may decide that refusing to provide references continues to be the clearest form of protection from suit. Initial evidence, although primarily anecdotal, suggests that the statutes have had virtually no impact on job reference practices.[14] Although legislation ostensibly protects employers in most states, "name, rank and serial number," "no-comment," and neutral reference policies continue to prevail as standard practice regarding job references.

Along with other commentators, I remain skeptical that the current forms of legislation will encourage employers to abandon limited reference policies.[15] However, notwithstanding the skepticism of scholars

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[11] *See* Evan Fray-Witzer, *The Minefield of Job References*, THE N.J. L.J., May 18, 1998, at 31. As Mr. Fray-Witzer, a Boston employment litigation and counseling attorney, explains: "By their nature, 'name, rank and serial number' policies must apply to everyone (or else an employee could argue that a [sic] such a response was simply code for 'keep away from this person'"). *Id.*

[12] *See, e.g.*, Verkerke, *supra* note 2, at 131-32; Alex B. Long, Note, *Addressing the Cloud Over Employee References: A Survey of Recently Enacted State Legislation*, 39 WM. & MARY L. REV. 177, 192 (1997).

[13] *See, e.g.*, Adler & Peirce, *supra* note 2, at 1420; Long, *supra* note 12, at 222. *See* discussion *infra* Part II, at pp. 10-14.

[14] *See* Cooper, *supra* note 2, at 311-12; Halbert & Maltby, *supra* note 1, at 411; Long, *supra* note 12, at 222.

[15] Commentators who have taken a skeptical view of the efficacy of existing reference immunity statutes include Verkerke, *supra* note 2, at 131-32 (questioning the ability of the statutory immunity to change the status quo because the statutes make no serious changes to the existing structure of common law liability); Halbert & Maltby, *supra* note 1, at 410-11 (arguing that reference immunity statutes are too heavily weighted in favor of employer concerns, do not protect employee interests, have failed to increase employers' security in provid-

and other observers of workplace trends, state legislatures have enacted reference immunity statutes in increasing numbers since the mid-1990s. In light of the firmly established trend toward reference immunity statutes, legislators should act to maximize the statutes' effectiveness and to provide clarity in the law concerning job reference liability.

This Article proposes that the field would be clarified if the statutes were the exclusive law governing liability for job reference claims under state law. Generally, the existing statutes leave the common law in place, so that reference claims may be adjudicated under statutory standards and common law standards. In addition, to change longstanding perceptions and conduct, reference immunity legislation should be combined with educational campaigns to inform employers and employees about the existence of the statutes, and rights and obligations under the statutes.[16] Without dissemination of information, the legislative movement has little chance of influencing workplace behavior. Employers and employees need to know about the existence of reference immunity laws. Otherwise, the statutes have limited opportunity to make a difference in the workplace.

Following an overview of common law principles applicable to job reference claims in Part I, Part II of this Article discusses the objectives of the emerging legislation. Part III examines the provisions of reference immunity laws. Part IV concludes that these statutes have no impact on employment reference practices. While I do not believe that legislation alone can bring about significant changes in job reference policies and practices, I refuse to conclude on such a dour, hopeless note. Consequently, Part IV also suggests proposals for increasing the effectiveness

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ing references, and "sharpen[ ] the degree of hostility in the employment context or take[ ] it as a given"); and Long, *supra* note 12, at 180 (concluding that "the majority of statutes will ultimately prove ineffective" in encouraging employers to provide references). Commentary regarding specific state statutes reflects similar concerns. *See, e.g.*, Phillip R. Jones, Jennifer A. Youpa & Stacey S. Calvert, *Annual Survey of Texas Law Article: Employment and Labor Law*, 53 SMU L. REV. 929, 962 (2000) (observing that "it appears unlikely that this statute will produce major changes in the way employers handle requests for job performance information regarding their employees"); Cathy A. Schainblatt, Comment, *The New Missouri Employer Immunity Statute: Are Missouri Employers Still Damned if They Do and Damned if They Don't?*, 44 ST. LOUIS U. L.J. 693, 699–700 (arguing that the Missouri statute does not decrease the odds that reasonable reference practices will be challenged, does not provide any more protection than existing common law, and does not provide sufficient incentives for employers to provide references); Jennifer L. Aron, Comment, *The Tug-of-War with Employment Information: Does Louisiana Revised Statutes 23:291 Really Help Employers Stay Out of the Mud?*, 58 LA. L. REV. 1133 (1998) (concluding that the Louisiana immunity statute will be of limited effectiveness because the statute "affords, if any, a small increase in the protection already afforded by the jurisprudence").

16 The public and private sector should work in tandem to provide such information. Legislatures could appropriate funds to ensure dissemination of information, efforts should be made to obtain media coverage regarding the legislation, and private sector organizations representing employers and employees must educate their constituents about the new laws.

of job reference immunity statutes. These proposals focus not only on modifying the legislative model but also on changing workplace culture, norms and employers' perceptions regarding job references.

I. COMMON LAW PRINCIPLES OF JOB REFERENCE LIABILITY

Job reference plaintiffs typically base their claims on a defamation theory, asserting that a negative reference contained false statements that injured the employee's reputation. In the employment context, false statements impugning one's ability or fitness for his or her job or imputing criminal conduct are defamatory.[17] Examples include unfounded allegations of misconduct,[18] incompetence or poor performance,[19] criminal or other illegal conduct,[20] dishonesty,[21] and falsification of records.[22] In addition, a plaintiff may pursue a claim of intentional interference with prospective economic advantage when an unfavorable job reference prevents her from receiving a job offer that she would have received otherwise. The interference tort may serve either as an alternative theory or an additional cause of action in a reference case.[23]

Traditionally, common law defamation privileges served as the primary source of protection for employers sued for providing negative job

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17 WILLIAM J. HOLLOWAY & MICHAEL J. LEECH, EMPLOYMENT TERMINATION RIGHTS AND REMEDIES 245-46 (2d ed. 1993).

18 *See, e.g.,* Barker v. Kimberly-Clark Corp., 524 S.E.2d 821(N.C. Ct. App. 2000) (use of illegal drugs and accessing pornography on the Internet while at work); Ritter v. Pepsi Cola, 785 F. Supp. 61 (M.D. Pa.1992) (drinking alcoholic beverages on the job); Lewis v. Equitable Life Assurance Soc'y, 389 N.W. 2d 876 (Minn. 1986) ("gross insubordination").

19 *See, e.g.,* Agarwal v. Johnson, 603 P.2d 58, 65 (Cal. 1979) ("lack of job knowledge"); Sigal Constr. Corp. v. Stanbury, 586 A.2d 1204, 1206 (D.C. 1991) (project manager described as being "detail oriented . . . to the point of losing sight of the big picture" and adding that "with a large staff [he] might be a very competent [project manager]"); Stuempges v. Parke, Davis & Co., 297 N.W.2d 252, 255 (Minn. 1980) (plaintiff described as a "poor salesperson" was "not industrious . . . would not get products out, was hard to motivate and could not sell").

20 *See, e.g.,* Krasinski v. United Parcel Serv., 530 N.E.2d 468, 469 (Ill. 1988) (theft); Deutsch v. Chesapeake Ctr., 27 F. Supp. 2d 642, 644 (D. Md. 1998) (sexual harassment and racial discrimination).

21 *See, e.g.,* Churchey v. Adolph Coors Co., 759 P.2d 1336, 1341 (Colo. 1988) (allegations that plaintiff failed to report that she had been given medical clearance to return to work); *Kransinski,* 530 N.E.2d, at 469 (theft allegations as grounds for dismissal for dishonesty).

22 *See, e.g.,* Zinda v. Louisiana Pac. Corp., 440 N.W.2d 548 (Wis. 1989) (employment forms); Kelly v. Gen. Tel. Co., 186 Cal. Rptr. 184 (Cal. Ct. App. 1982) (invoices); Romano v. United Buckingham Freight Lines, 484 P.2d 450 (Wash. Ct. App. 1971) (time and mileage logs).

23 *See, e.g.,* Anderson v. Vanden Dorpel, 667 N.E.2d 1296 (Ill. 1996); Stelzer v. Carmelite Sisters, 619 S.W.2d 766, 767 (Mo. Ct. App. 1981) (interference cause of action combined with slander claim); Geyer v. Steinbronn, 506 A.2d 901, 904 (Pa. Super. Ct. 1986) (interference claim combined with defamation). For a general discussion of the interference theory in job reference cases, see Alex B. Long, *Tortious Interference with Business Relations: "The Other White Meat" of Employment Law,* 84 MINN. L. REV. 863, 898-913 (2000).

references.[24] Under the common law, employers who provide job references benefit from a qualified or conditional privilege.[25] The purpose of the privilege is to promote candid and open workplace communication, including providing employers with the freedom to give references without fear of defamation liability.[26] Some courts may apply these privileges to interference with business relations claims as well.[27] The common law qualified privilege protects employers unless they abuse the privilege. An employer may abuse the privilege by providing information that she knows is false, by acting in reckless disregard for the truth or falsity of the information, by communicating the statements to persons who are not within the purpose of the privilege, or by excessive publication.[28]

Many employers, however, lack confidence in the qualified privilege's capacity to protect them. While the privilege is a key defense to reference-based claims, the legal standards can be complex, unclear and uncertain.[29] Moreover, the issue of abuse is central to most cases where qualified privilege arises. Because abuse of the privilege is a factual

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[24] In some states, the defamation law privileges are codified in statutes. *See, e.g.*, CAL. CIV. CODE § 47c (West 2001); ARIZ. REV. STAT. § 23-1361(B)-(C) (Supp. 2000).

[25] Courts have applied the common interest privilege to employment references. *See, e.g.*, Hett v. Ploetz, 121 N.W.2d, 270 at 272-73 (Wis. 1963); Circus Circus Hotels, Inc. v. Witherspoon, 657 P.2d 101, 105 n. 3 (Nev. 1983); Sigal Const. Corp. v. Stanbury, 586 A.2d 1204, 1213-14 (D.C. 1991); MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW § 1.8 at 20-21 (2d ed. 1999). The common interest privilege is described in the Restatement of Torts:

> An occasion makes a publication conditionally privileged if the circumstances lead any one of several persons having a common interest in a particular subject matter correctly or reasonably to believe that there is information that another sharing the common interest is entitled to know.

RESTATEMENT (SECOND) OF TORTS § 596 (1977).

In addition, based on the common interest privilege, courts have recognized a specific qualified privilege for employment references. *See, e.g.*, Chambers v. American Trans Air, Inc., 577 N.E.2d 612, 615 (Ind. Ct. App.1991) ("As a general rule an employee reference given by former employer to a prospective employer is clothed with the mantle of qualified privilege"); Thacker v. Peak, 800 F. Supp. 372, 387 (S.D. W.Va. 1992) ("In conformity with the Restatement's position, a number of states have recognized a qualified privilege in the giving of employee references in response to a request from a prospective employer").

[26] Pamela G. Posey, Note, *Employer Defamation: The Role of Qualified Privilege*, 30 WM. & MARY L. REV. 469, 484 (1989).

[27] *See* Long, *supra* note 23, at 900.

[28] ROTHSTEIN ET AL., *supra* note 25, § 1.8 at 21. *See also* RESTATEMENT (SECOND) OF TORTS § 605 (1977) (the privilege is abused by communication of a defamatory statement where the speaker "does not reasonably believe [it is] necessary to accomplish the purpose for which the privilege is given."). For other general discussions of the qualified privilege in the job reference context, see Deborah Daniloff, Note, *Employer Defamation: Reasons and Remedies for Declining References and Chilled Communications in the Workplace*, 40 HASTINGS L.J. 687, 708-11 (1988) (describing and critiquing qualified privilege standards); Pamela G. Posey, *supra* note 26, at 487-91; Donald Paul Duffala, Annotation, *Defamation: Loss of Employer's Qualified Privilege to Publish Employee's Work Record or Qualification*, 24 A.L.R. 4th 144 (1983).

[29] Cooper, *supra* note 2, at 305; Saxton, *supra* note 1, at 77.

question, privilege issues often will go to a jury for resolution.[30] From an employer's standpoint, the common law qualified privilege provides limited, if any, protection as a practical matter.

> The employer who asserts a qualified privilege can expect the plaintiff to argue that the employer abused the privilege, and this issue . . . takes the case to the jury. As cases reach juries, the likelihood of a plaintiff's verdict increases. While employers ultimately may prevail on appeal, litigation through appeal is a costly and draining process which employers generally prefer to avoid. In addition, courts are hesitant to reverse a jury's factual determination regarding . . . loss of the qualified privilege. Consequently, employers can expect to incur substantial defense costs as . . . cases proceed through discovery, trial, and if necessary, appeal.[31]

While the privilege may limit the number of actions in which employers ultimately face liability, most employers prefer to avoid litigation entirely, if at all possible. The common law privilege, then, falls short of providing a shield that encourages frank, candid, and open reference policies. To remedy this shortfall in protection, states crafted legislative shields for employers, looking to statutory immunity as the solution to the "name, rank and serial number" problem.

II. OBJECTIVES OF REFERENCE IMMUNITY LEGISLATION

To the extent that no comment and "name, rank and serial number" policies protect employers, the protection comes at the expense of communication in the job market. Employers' silence policies arrest the flow of positive information as well as negative information that most typically creates the risk of being sued. The consequences of employer silence affect the employers who seek references as well as job seekers who would benefit from receiving positive references. When employers refrain from disclosing information regarding dangerous or incompetent employees, prospective employers, new co-workers and the public also are affected. Furthermore, if refusal to provide substantive references becomes standard workplace practice, fear of liability substantially chills workplace communication, to the detriment of employers, employees and society. As Halbert and Maltby observe:

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[30] *See, e.g.*, Jones v. Cent. Peninsula Gen. Hosp., 779 P.2d 783, 790 (Alaska 1989); Dominguez v. Babcock, 727 P.2d 362, 366 (Colo. 1986). *See also* RESTATEMENT (SECOND) OF TORTS § 619 (1977); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 115 at 835 (5th ed. 1984).

[31] Markita D. Cooper, *Between a Rock and a Hard Case: Time for a New Doctrine of Compelled Self-Publication*, 72 NOTRE DAME L. REV. 373, 438 (1997).

> As a society, we are all harmed by the ongoing reality that employees cannot show how well they are qualified for positions, and that employers cannot quickly identify the right people for the right positions. The problem . . . undermines everyone's standard of living continuously; it's a steady drain on our economy. Like a slow-acting carcinogen, it does much of its damage just beneath our communal consciousness.[32]

As many employers refrain from providing references, most employers—including some who refuse to give them—continue to seek references and see them as a critical part of the hiring process. Even though fear of litigation chills the flow of reference information, employers still need and desire such information. Instances of workplace violence demonstrate the sometimes tragic consequences of employers' inability to obtain relevant information in references, particularly in cases of employees with a history of violent conduct.[33] With increased concern regarding defamation claims and concern regarding workplace violence, the widespread use of "no comment" reference policies gained the attention of state legislators.[34]

In the early 1990s, only two states, Colorado and Florida, had enacted reference immunity statutes.[35] Ten years later, as 2000 drew to a close, a total of thirty-six states adopted reference immunity legislation, leaving only fourteen states and the District of Columbia without statutory immunity.[36] At the beginning of the twenty-first century, reference immunity is now a standard component of state employment law in the United States.

Support for the statutes typically comes from lobbyists for human resource managers, large and small businesses, and chambers of commerce.[37] Proponents herald reference immunity statutes as an effective

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32 Halbert & Maltby, *supra* note 1, at 403.

33 *See* Cooper, *supra* note 2, at 314-24.

34 Most of the statutes appear to respond principally to employers' concern about defamation liability, although negative references may generate interference and other claims from employees. *See* Long, *supra* note 23, at 900.

35 Florida enacted the first such statute in 1991. FLA. STAT. ANN. § 768.095 (West 1997) (effective July 1, 1991) (amended 1999). Colorado followed in 1992. COLO. REV. STAT. ANN. § 8-2-114 (West 1997) (effective Apr. 29, 1992) (repealed and reenacted 1999).

36 Washington Governor Gary Locke vetoed a reference immunity bill in 1998. *See* Hal Spencer, *Job Reference Shield for Bosses Vetoed*, SEATTLE POST-INTELLIGENCER, Apr. 3, 1998, at E1. For a table listing the state reference immunity statutes in effect as of January 2002, see Appendix A.

37 The Fairfax, Virginia-based Society for Human Resource Management has been a driving force for the passage of reference immunity statutes. Bill Leonard, *HR Leads Fight for State Reference-Checking Laws*, HR NEWS (Oct. 1995). In addition, representatives of organizations such as the National Federation of Independent Businesses, state and local chambers of

response to employers' concerns regarding the risks of providing references and the difficulty of obtaining useful information about job applicants.[38] The statutes discourage frivolous lawsuits based on job references,[39] and reduce employers' fear of being sued for disclosing more than "name, rank and serial number."[40] By reducing employers' fear of liability, the statutes encourage employers to provide references.[41] The increased availability of references benefits employees and the public as well. Employees who deserve positive references will benefit when those references—rather than "name, rank and serial number" responses—are communicated to prospective employers.[42] Some supporters assert that an increased flow of reference information will increase safety in the workplace because employers will be more likely to dis-

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commerce and other business advocacy groups typically appear in press reports as supporters of immunity bills. *See infra* notes 38 and 40.

38 *See, e.g.*, Scott Carlson, *Job References Get Protection in Bill*, ST. PAUL PIONEER PRESS, Apr. 22, 1999, at 1C (supporters and sponsors of legislation arguing that employers "will do a better job of hiring" based on a greater ability to disseminate information); *Focus on Job Reference Immunity*, 11 INDIV. EMP. RTS. 14 (BNA) (May 21, 1996) (according to Rep. Mary Lazich (R), sponsor of the Wisconsin statute, the legislation was prompted in part by employers who needed more information regarding prospective employees' disciplinary problems in previous jobs; legislation will "level the playing field in that the employer can feel comfortable to give out honest and fair information"); Julie Forster, *25 States Adopt 'Good Faith' Job Reference Laws to Shield Businesses from Liability*, WEST'S LEGAL NEWS 6402 (July 2, 1996) *in* 1996 WL 363324 (before the legislation was enacted, employers did not have enough information to make good hiring decisions, according to Michael Fields, the South Carolina state director of the National Federation of Independent Businesses).

39 *See, e.g.*, Catherine Candisky, *'Loser Pay' Amendment Won't Stay in House Bill*, COLUMBUS DISPATCH, Mar. 12, 1995, at 4B (reporting that intent of sponsor of Ohio statute "was to protect business owners like himself from frivolous employee lawsuits").

40 *See, e.g.*, *The Morning Memo*, THE KANSAS CITY STAR, May 12, 1999, at C1 (reporting that Missouri Merchants and Manufactures Association and other supporters "say the provisions reduce employers' fears that they will be sued for giving anything other than names and dates of employment when asked for job references.").

41 *See, e.g.*, Jeffrey Goodman, *Providing References for Employees Just Got Easier for Iowa – Part I*, IOWA EMPL. L. LETTER, July 1999 (immunity legislation protects employers and encourages the free exchange of information); Bruce Hight, *Bill Protects Companies from Job Reference Suits; Former Employers Would be Given More Legal Protection from Libel Suits for Honest Evaluations*, AUSTIN AMERICAN-STATESMAN, May 7, 1999, at D3; *Law Could Restore Real Job References*, SEATTLE POST-INTELLIGENCER, Mar. 12, 1998, at A12 (editorial endorsing legislation, arguing that the legislation would "restart" an "informal system of job references" with employers feeling free to exchange information).

42 *See, e.g.*, Nancy Hicks, *Job Reference Shield Sought for Employers*, OMAHA WORLD-HERALD, Feb. 5, 1999, at 16 (noting supporters' argument that good employees are penalized by employers' refusals to provide references and quoting Nebraska bill's sponsor, Speaker Doug Kristensen, who declared, "I'm more concerned about the good employee who does not get a recommendation"); Ray Schow, *Honest Job References Make Workplaces Safer*, THE SEATTLE TIMES, Apr. 3, 1998, at B7 (article by the prime sponsor of Washington reference immunity bill, arguing that reluctance to provide references hurts good employees who need references); *To Tell the Truth: Encourage Accurate Job References*, MONTGOMERY ADVERTISER, Mar. 22, 1996, at 10A (urging approval of immunity bill and deploring "name, rank and serial number" references as unfair to good employees who would benefit from good references).

close information regarding violent or other dangerous conduct by employees.[43] In all, say proponents, both employers and employees will benefit from the reference immunity statutes.[44] Accordingly, supporters and sponsors view the statutes as necessary, effective, and crafted to strike the proper balance of rights of employers and employees in the matter of references.

Not so, say critics of the reference immunity statutes. In many states, organized labor and trial lawyers lobbied in fierce opposition to the legislation.[45] Opponents argue that such laws focus only on employers' interests, without sufficient consideration of the rights of employees.[46] For example, the statutes block meritorious claims by requiring plaintiffs to prove the reference provider acted in bad faith, and in some states, requiring such proof by clear and convincing evidence.[47] Opponents of the legislation also argue that the statutes are an unnecessary, heavy-handy response to a perceived, but not actual, problem. These critics emphasize that the actual amount of litigation involving employment references is small.[48] Moreover, they conclude that existing common law provides adequate protection for employers.[49] What the

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[43] *See, e.g.*, David C. Olson, *Minnesota: Key Reform Bills Head for State Senate*, THE METROPOLITAN CORPORATE COUNSEL, Feb. 2000, at 38 (workplace safety "depends on receiving accurate information about potential employees' past violent or harassing behavior"); Schow, *supra* note 42, at B7 (statute addresses public safety and permits employers to screen unsuitable workers before they are hired); Tannette Johnson-Elie, *Bill Could Ease Fear of Giving References: State Legislation Gives Employers Immunity*, MILWAUKEE J. SENTINEL, June 2, 1996, at 1 (describing how state legislation would immunize employers for disclosing an employee's history of violence or other workplace problems to prospective employers).

[44] *See, e.g., Truthful Job References The Issue: Bill Would Protect Candid Employers Our View: It's Good for Businesses and Workers Both*, DENVER ROCKY MOUNTAIN NEWS, Mar. 17, 1999, at 43A (editorial supporting statute and arguing that "both job-seekers and employers benefit when information flows freely and openly"); *Law Could Restore Real Job References*, *supra* note 41 (editorial arguing that restoring the informal system of job references would create a "real benefit to the majority of employers and employees").

[45] Representatives of the AFL-CIO and trial lawyers' associations often appear in press reports of efforts to defeat pending reference immunity bills, the statutes, and criticisms of reference immunity legislation generally. *See infra* notes 47-50.

[46] *See, e.g.*, Halbert & Maltby, *supra* note 1, at 410.

[47] *See, e.g.*, Carlson, *supra* note 38, at 1C (Minnnesota Trial Lawyers Association's argument that statute with clear and convincing evidence standard "would virtually eliminate the right of aggrieved workers suing for defamation" because of the stringent standard of proof). *See also* discussion *infra* at Part III. C.

[48] *See, e.g.*, Hicks, *supra* note 42, at 16 (finding no need for a statute in a state where few employees win lawsuits and quoting Kathleen Neary of the Nebraska Association of Trial Attorneys as stating "[t]here have been no runaway verdicts"); Scott Carlson, *Minnesota Bill Would Give Protection to Job References*, ST. PAUL PIONEER PRESS, Apr. 22, 1999, at 1C, *available at* 1999 WL 16645312 (statute not needed when less than 10% of employment lawsuits involve reference disputes) (position of Minnesota Trial Lawyers Association).

[49] *See, e.g.*, Jeff Sturgeon, *Businesses Want Law to Take Risk Out of Giving References*, ROANOKE TIMES & WORLD NEWS, Feb. 1, 1998, at 2 (stating opponents' argument that existing court decisions protect employers); Andrew Backover, *Legislation Would Limit Liability for Truthful References; Trial Lawyers and Organized Labor Say the Proposal Could Lead to*

statutes provide, opponents warn, is a "blank check" for abusive reference practices, and little legal recourse for legitimately aggrieved employees.[50]

Both proponents and opponents may overestimate the power of reference immunity legislation. Currently available evidence suggests that the statutes rarely affect employers' perceptions or conduct regarding references.[51] Moreover, even after legislatures enact immunity statutes, legal advisors continue to recommend "name, rank and serial number" references as the safest policy.[52]

Abuse by Employers, FT. WORTH STAR-TEL., Dec. 12, 1998, at 1 (arguing that the statute is an "unnecessary repetition of Texas common law").

50 *See, e.g., Illinois Offers Employers Immunity for Truthful Employment References*, DAILY LAB. REP. (BNA) No. 116, June 17, 1996, at A-3 (noting argument by Daniel Johnson, president of the Illinois AFL-CIO, that statute grants employers a "blank check to say almost anything about an employee and suffer no consequences"); Hicks, *supra* note 42, at 16 (under the statutes, "[e]mployers can lie with impunity") (quoting Nebraska Sen. Ernie Chambers).

51 While noting that the statutes are relatively new, Halbert and Maltby concluded that "at this point the laws appear to be having little or no effect . . . .The hiring professionals we spoke to for this article repeatedly told us that the fear of being sued remains as strong as ever." Halbert & Maltby, *supra* note 1, at 411; *see also* Cooper, *supra* note 2, at 311-12 (discussing limited impact of immunity statutes).

52 *See, e.g.*, Halbert & Maltby, *supra* note 1, at 411; Cooper, *supra* note 2, at 311-12. A review of human resource and legal publications for employers also evidences little change in advice and practices regarding job references, even after states adopt immunity statutes. *See, e.g.*, Bill Leonard, *Reference Checking Laws: Now What?*, HR MAG., Dec. 1995, at 57 (noting that while Florida passed a reference immunity statute in 1992, employers in Florida tend to verify only dates of employment and salary history of former employees); James C. Milton, *Former Employees May Use Job Reference Verification Services, Too*, OKLA. EMPL. LAW LETTER, Mar. 1999, at 2 (stating that "Oklahoma law offers some protection if you provide a negative job reference and are later sued for defamation . . . .So what should you do if you're asked for information about a former employee? Many risk-minded employers limit their answers to dates employed and positions held. There is nothing wrong with this name, rank, and serial number approach."); *Colorado Legislature Creates New Wrinkles to Old Laws*, COLO. EMP. L. LETTER, June 1999, at 1 (advising procedures for providing substantive job references after statute with the caveat that "[t]he old 'name, rank, and serial number' type of job reference is the best shield against a defamation claim"); Terry E. Thomason, *Job References Revisited*, PAC. EMP. L. LETTER, June 1999, WL 3 No. 12 SMPACEMPLL 6, (providing recommended procedures for providing references in light of the Hawaii Job Reference Immunity Act, yet also noting that "[t]he safest job reference policy is one that authorizes the disclosure of nothing more than employment data, such as full name, hire date, positions held, salary/wage rate, and departure date.").

Cf. Jeffrey Goodman, *Providing References for Employees Just Got Easier for Iowa*, IOWA EMP. L. LETTER, July 1999, at 6-7 (discussing Iowa's reference immunity statute featuring a heading proclaiming "[n]o more 'name, rank, and serial number'"). Post-statute advice sometimes includes providing references only if the employee signs a release waiving claims based on the reference. *See, e.g., Legislature Passes Laws on Employment References*, TEX. EMP. L. LETTER, July 1999, at 2. Releases provide grounds for the defense of consent under the common law defamation doctrine as well. *See, e.g.*, Cox v. Nasche, 70 F.3d 1030, 1031 (9th Cir. 1995) (stating that employer has absolute privilege based on a signed release). *See also* RESTATEMENT (SECOND) OF TORTS § 583 (1977) ("[T]he consent of another to the publication of defamatory matter concerning him is a complete defense to his action for defamation."); Adler & Peirce, *supra* note 2, at 1404.

III. THEMES AND VARIATIONS: THE LANGUAGE OF REFERENCE IMMUNITY STATUTES

As previously discussed, most states enacted reference immunity statutes to encourage employers to provide candid, meaningful references. Generally, these statutes protect employers who in good faith provide job-related information in references.[53] To prevail in a reference claim, an employee must prove that her employer lacked good faith or failed to comply with the statute in some other fashion.[54] But what kind of conduct constitutes a lack of good faith? How strong must the evidence be to prove an employer acted in bad faith? What kind of information is covered by the statute and under what circumstances is it covered? Can employers and employees rely on both the common law and the immunity statute? In answering these and other questions, the statutes sometimes provide no guidance or are incomprehensible, and they can vary widely.

A. PRESUMPTION OF GOOD FAITH AND QUALIFIED IMMUNITY

Most statutes provide employers who give references a qualified immunity from liability.[55] Typically, the statutes presume that an employer who provides a job reference acts in good faith.[56] The presumption is rebuttable. Some statutes accomplish a similar goal by

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53 See discussion *infra* Part III. A.

54 See discussion *infra* Part III. B.

55 The overwhelming majority of statutes provide qualified immunity. The Kansas statute also provides absolute immunity for specified categories of information. KAN. STAT. ANN. § 44-119a(c) (2000). *See* discussion *infra* Part III.B.4.

56 *See, e.g.*, ALASKA STAT. § 09.65.160 (Michie 2000); ARK. CODE ANN. § 11-3-204(a)(2) (Michie 2001); DEL. CODE ANN. tit. 19, § 709(a) (Supp. 2000); GA. CODE ANN. § 34-1-4(b) (Michie Supp. 2001); HAW. REV. STAT. § 663-1.95(a) (Supp. 2000); IDAHO CODE § 44-201(2) (Michie 1997); 745 ILL. COMP. STAT. ANN, 46/10 (West Supp. 2001); IND. CODE ANN. § 22-5-3-1 (Michie 1997) ("immune from civil liability . . . unless proven . . . that the information was known to be false at the time disclosure was made"); LA. REV. STAT. ANN. § 23:291A (West 1998) ("immune from civil liability . . . provided such employer is not acting in bad faith") (the heading of § 291 refers to "presumptions"); ME. REV. STAT. ANN., tit. 26, § 598 (West Supp. 2000); MD. CODE ANN., CTS. & JUD. PROC. § 5-423(b) (1998); MICH. COMP. LAWS ANN. § 423.452 (West 2001) ("presumption of good faith" or similar language); OKLA. STAT. ANN. tit. 40, § 61.A (West 1999); OR. REV. STAT. § 30.178 (1999); R.I. GEN. LAWS § 28-6/4-1(c) (2000); S.D. CODIFIED LAWS § 60-4-12 (Michie Supp. 2001); TENN. CODE ANN. § 50-1-105 (Supp. 2001); UTAH CODE ANN. §34-42-1(2) (1997) ("rebuttable presumption that an employer is acting in good faith when the employer provides information . . . at the request of a prospective employer"); VA. CODE ANN. § 8.01-46.1.A (Michie 2000); WIS. STAT. ANN. § 895.487(2) (West Supp. 2001); WYO. STAT. ANN. § 27-1-113(a) (Michie 2001) ("presumed to be acting in good faith" or similar language). The Arizona statute ties the presumption of good faith on the size of the employer. ARIZ. REV. STAT. ANN. § 23-1361.C (West Supp. 2001) (for employers who employ less than 100 employees, the good faith presumption applies if the employer provides reason for termination or information regarding job performance, professional conduct or evaluation; if the employer employs at least 100 employees and has a "regular practice" in Arizona of providing information to prospective employers upon

conditioning the immunity on good faith without expressly offering a presumption of good faith.[57] Under either formulation, plaintiffs cannot prevail in job reference claims without proving that the reference provider did not act in good faith. This threshold requirement increases the difficulty of establishing a job reference claim, particularly in states that require plaintiffs to establish lack of good faith with clear and convincing evidence.[58]

B. REBUTTING THE PRESUMPTION OF GOOD FAITH

Because the centerpiece of the immunity is the employer's good faith, statutes should set forth clear standards for what constitutes good faith or its absence. Most immunity statutes do not offer groundbreaking new standards in this area. Instead, statutes typically echo the language of common law defamation standards for abuse of the qualified privilege by providing that defendants forfeit the immunity when they knowingly provide false information,[59] or act with reckless disregard for truth or falsity.[60] A few states venture further, permitting plaintiffs to prove bad

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request regarding reasons for termination or information about job performance, professional conduct, or evaluation, the good faith presumption applies to such disclosures).

57 *See, e.g.*, KAN. STAT. ANN. § 44-119a(a) (2000) ("Unless otherwise provided by law, an employer . . . who discloses information about a current or former employee to a prospective employer of the employee shall be qualifiedly immune from civil liability."); N.M. STAT. ANN. § 50-12-1 (Michie Supp. 2000) ("When requested to provide a reference on a former or current employee, an employer acting in good faith is immune from liability for comments about the former employee's job performance. The immunity shall not apply when the reference information supplied was knowingly false or deliberately misleading, was rendered with malicious purpose . . . ."); MO. REV. STAT. § 290.152.4 (2000) ("[A]n employer shall be immune from civil liability . . . unless such response was false and made with knowledge that it was false or with reckless disregard for whether such response was true or false."); MONT. CODE ANN. § 27-1-737 (2001) ("A nonpublic employer . . . is not liable . . . unless the employer knowingly, purposely, or negligently disclosed information that was false."); NEV. REV. STAT. ANN. § 41.755(3) (Michie 1999) (enumerating circumstances under which employer is not immune); OHIO REV. CODE ANN. § 4113.71(3)(B) (Anderson 2001) ("An employer who is requested by an employee or a prospective employer of an employee to disclose to a prospective employer . . . information pertaining to the job performance of that employee . . . is not liable in damages in a civil action . . . unless the plaintiff in a civil action establishes . . . ."); S.C. CODE ANN. § 41-1-65(B),(D) (Law Co-op Supp. 2000) ("Unless otherwise provided by law, an employer shall be immune from civil liability . . . This protection and immunity shall not apply where an employer knowingly or recklessly releases or discloses false information.").

58 See discussion *infra* Part III.B.1.

59 *See, e.g.*, HAW. REV. STAT. § 663-1.95(b)(1) (Supp. 2000); 745 ILL. COMP. STAT. ANN. 46/10 (West Supp. 2001); MONT. CODE ANN. § 27-1-737 (2001) ("knowingly" or "purposely . . . disclosed information that was false"); NEV. REV. STAT. ANN. § 41.755.3(d) (Michie 1999) ("intentionally disclosed inaccurate information"); N.D. CENT. CODE § 34-02-18.2.a (1999 Supp.); OHIO REV. CODE ANN. § 4113.71(B)(1) (Anderson 2001); TEX. LAB. CODE ANN. § 103.004(a) (Vernon Supp. 2002); VA. CODE ANN. § 8.01-46.1(A) (Michie 2000). *See* discussion *infra* Part III.B.1.

60 *See, e.g.*, ARIZ. REV. STAT. ANN. § 23-1361(D) (West Supp. 2001); MD. CODE ANN., CTS. & JUD. PROC. § 5-423(b)(2) (1998); MICH. COMP. LAWS ANN. § 423.452.2(a) (West

faith by demonstrating that the employer's reference violated nondiscrimination or civil rights laws,[61] or confidentiality or other agreements.[62]

1. *Lack of Good Faith: Knowing Falsity, Recklessness, Negligence, or Malicious Purpose*

Under some statutes, a plaintiff can rebut the good faith presumption by proving the employer knew the information was false or that the employer intentionally or deliberately provided misleading information.[63] An employer who discloses false information without knowing it was false risks losing immunity under statutes that provide a showing of reckless[64] or negligent[65] conduct rebuts the presumption of good faith.

2001); OKLA. STAT. ANN. tit. 40, § 61(A) (West 1999); TEX. LAB. CODE ANN. § 103.004(a) (Vernon Supp. 2002); VA. CODE ANN. § 8.01-46.1.A (Michie 2000). *See* discussion *infra* Part III.B.1.

61 *See, e.g.*, ALASKA STAT. § 09.65.160(2); COLO. REV. STAT. ANN. § 8-2-114(6) (West Supp. 2001); FLA. STAT. ANN. § 768.095 (West Supp. 2002); 745 ILL. COMP. STAT. ANN. 46/10 (West Supp. 2001); N.M. STAT. ANN. § 50-12-1 (Michie Supp. 2000); IOWA CODE § 91B.2.a. (West Supp. 2001); OHIO REV. CODE ANN. § 4113.71(B)(2) (Anderson 2001); OR. REV. STAT. § 30.178 (1999); R.I. GEN. LAWS § 28-6.4-1(c)(4) (2000); TENN. CODE ANN. § 50-1-105(5) (2001 Supp.); WIS. STAT. ANN. § 895.487(2) (West Supp. 2001). *See* discussion *infra* Part III.B.2.

62 *See, e.g.*, DEL. CODE ANN. tit. 19, § 709(a) (Supp. 2000); GA. CODE ANN. § 34-1-4(b) (Michie Supp. 2001); S.D. CODIFIED LAWS § 60-4-12 (Michie Supp. 2001) (confidentiality agreements); NEV. REV. STAT. ANN. § 41.755.3(f) (Michie 1999) (any agreement with the employee). *See* discussion *infra* Part III.B.3.

63 *See, e.g.*, HAW. REV. STAT. § 663-1.95(b) (Supp. 2000); NEV. REV. STAT. ANN. § 41.755.3(d) (Michie 1999); N.D. CENT. CODE § 34-02-18.2.a; 18.2.b (1999 Supp.); TEX. LAB CODE ANN. § 103.004(a) (Vernon Supp. 2002); VA. CODE ANN. § 8.01-46.1.A (Michie 2000); 745 ILL. COMP. STAT. ANN. 46/10 (West Supp. 2001); OHIO REV. CODE ANN. § 4113.71(B)(1) (Anderson 2001). The statutes in Colorado and Florida, two states that were among the first to enact reference immunity legislation, originally included similar language. In 1999, however, both legislatures deleted the knowing falsity language. The Colorado statute was repealed and reenacted at that time; the Florida statute was amended. *See* COLO. REV. STAT. ANN. § 8-2-114 (West Supp. 2001), Historical and Statutory Notes; FLA. STAT. ANN. § 768.095 (West Supp. 2002), Historical and Statutory Notes.

64 *See, e.g.*, ARIZ. REV. STAT. ANN. §23-1361.D (West Supp. 2001); MD. CODE ANN., CTS. & JUD. PROC. § 5-423(b)(2) (1998); MICH. COMP. LAWS ANN. § 423.452 sec.2b (West 2001); NEV. REV. STAT. ANN. § 41.7553(d) (Michie 1999); OKLA. STAT. ANN. tit. 40, § 61A (West 1999); TEX. LAB. CODE ANN. § 103.004 (Vernon Supp. 2002); VA. CODE ANN. § 8.01-46.1.A (Michie 2000) (recklessness).

65 *See, e.g.*, COLO. REV. STAT. ANN. § 8-2-114(3)(a)-(b) (West Supp. 2001) (information disclosed was false and "[t]he employer who furnished the information knew or reasonably should have known the information was false."); MONT. CODE ANN. § 27-1-737 (2001) (negligence); N.C. GEN. STAT. § 1-539.12(a)(2) (1999) (employer "knew or reasonably should have known that the information was false"); NEV. REV. STAT. ANN. § 41.755.3(c) (Michie 1999) (disclosure of information which employer "had no reasonable grounds for believing was accurate"). The Florida statute is codified in Chapter 768 of Florida Statutes, under general tort law provisions regarding negligence. The statute, however, does not state a negligence standard for rebutting the presumption of good faith. *See* FLA. STAT. ANN. § 768.095 (West Supp. 2002).

In some states, the statutes also consider the reference provider's motive or attitude toward the plaintiff, permitting plaintiffs to rebut the presumption by proving the employer provided false information with a malicious purpose.[66] One state, Maine, requires the plaintiff to prove malicious intent as well as proving that the disclosure was false or deliberately misleading.[67] The meaning of malicious purpose under the statutes remains largely undefined. Perhaps no specified meaning is required. Consider the Georgia statute, which provides that proof of "lack of good faith" rebuts the presumption of good faith.[68] The statute offers no further explanation or definition of good faith. This treatment of good faith and bad faith is reminiscent of the words of United States Supreme Court Justice Stewart: "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it."[69]

While perhaps one does recognize lack of good faith when one sees it, the most likely result of the statutory scheme is that the definition of good faith will only become apparent after the issue is litigated. Because the existence or lack of good faith determines whether the employer has immunity, statutes should provide clearer guidance for employers and employees regarding exactly what kind of conduct forfeits the immunity.

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66 *See e.g.*, ALASKA STAT. § 09.65.160(1); ARK. CODE ANN. § 11-3-204(a)(2) (Michie 2001) ("malice"); DEL. CODE ANN. tit. 19, § 709(a) (Supp. 2000); IOWA CODE § 91B.2.c (West Supp. 2001); ME. REV. STAT. ANN. tit. 26, § 598 (West Supp. 2000); MD. CODE ANN., CTS AND JUD. PROC. § 5-423(b)(1) (1998) ("actual malice"); NEV. REV. STAT. ANN. § 41.755.3(a) (Michie 1999) ("malice"); N.M. STAT. ANN. § 50-12-1 (Michie Supp. 2000); N.D. CENT. CODE § 34-02-18.2.d (1999 Supp.); OHIO REV. CODE § 4113.71(B)(1) (Anderson 2001); OKLA. STAT. ANN. tit. 40, § 61.A (West 1999) ("malice"); OR. REV. STAT. § 30.178 (1999); R.I. GEN LAWS § 28-6.4-1(c)(3) (2000); S.D. CODIFIED LAWS § 60-4-12 (Michie Supp. 2001); TENN. CODE ANN. § 50-1-105 (2001 Supp.); TEX. LAB. CODE ANN. § 103.004(a) (Vernon Supp. 2002) ("malice"); WIS. STAT. ANN. § 895.487(2) (West Supp. 2001); WYO. STAT. ANN. § 27-1-113(a) (Michie 2001). The statute in California does not use the presumption language, but does speak in terms of lack of malice as prerequisite for privileged status. CAL. CIV. CODE § 47(c) (West Supp. 2001) (Privilege applies to "a communication concerning the job performance or qualifications of an applicant for employment, based upon credible evidence, made without malice, by a current or former employer of the applicant to, and upon the request of, the prospective employer.").

67 ME. REV. STAT. ANN. tit. 26 § 598 (West Supp. 2001) (requiring "clear and convincing evidence of . . . knowing disclosure, with malicious intent, of false or deliberately misleading information"). The statutes in Colorado and Florida originally permitted a showing of malicious purpose to defeat the immunity. In 1999, these legislatures deleted the malicious purpose language by repealing and reenacting the Colorado statute and by amending the Florida statute. *See* COLO. REV. STAT. ANN . § 8-2-114 (West Supp. 2001), Historical and Statutory Notes; FLA. STAT. ANN. § 768.095 (West Supp. 2002), Historical and Statutory Notes.

68 GA. CODE ANN. § 34-1-4(b) (Michie Supp. 2001).

69 Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Justice Stewart's words regarding obscenity in his concurring opinion).

2. *Violation of Law*

In ten states, employers who provide references that violate civil rights or nondiscrimination laws will lose the immunity.[70] Some states limit applicable civil rights statutes to state law, while others include federal law.[71]

These provisions exclude discriminatory references from the protection of the statutes. At first glance, discrimination provisions in the immunity statutes may appear superfluous because discriminatory references violate Title VII of the Civil Rights Act of 1964.[72] However, not all employers are covered by Title VII. For example, Title VII does not apply to employers with fewer than fifteen employees.[73] Consequently, nondiscrimination provisions in the immunity statutes clarify that any employee who suffers discrimination in references may sue an offending employer.

Three statutes speak more broadly regarding the "violation of law" ground for forfeiting the immunity. In Michigan and Nevada, an employer loses the immunity if the disclosure violates state or federal law generally. Neither statute confines its language to anti-discrimination or civil rights laws.[74] The Arkansas statute precludes immunity where an employer uses a reference to discriminate or retaliate for an employee's exercise of his or her rights under federal or state statute or for "actions encouraged by the public policy of this state."[75]

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70 *See* ALASKA STAT. § 09.65.160(2) (Michie 2000) ("violation of civil right . . . protected under [state] or . . . federal law"); COLO. REV. STAT. ANN. § 8-2-114(6) (West Supp. 2001) (providing that the reference immunity statute shall not be "construed to abrogate or contradict the provisions of [Colorado's law prohibiting discriminatory or unfair employment practices (COLO. REV. STAT. § 24-34-401 *et seq.* 2000)]"); FLA. STAT. ANN. § 768.095 (West Supp. 2002) (employer loses the immunity by violating "any civil right protected under [the Florida Civil Rights Act of 1992 (Fla. Stat. § 760.01 *et seq.*)]");745 ILL. COMP. STAT. ANN. 46/10 (West Supp. 2001) ("violation of a civil right"); N.M. STAT. ANN. § 50-12-1 (Michie Supp. 2000) (civil rights); OHIO REV. CODE ANN. § 4113.71(B)(2) (Anderson 2001) ("disclosure constitutes an unlawful discriminatory practice under state law"]); OR. REV. STAT. § 30.178 (1999) (violation of civil right under state law); R.I. GEN. LAWS § 28-6.4-1(c)(4) (2000) (violation of "employee's civil rights under employment discrimination laws in effect at the time of the disclosure"); TENN. CODE ANN. § 50-1-105(5) (2001 Supp.) (violation of "civil rights pursuant to current employment discrimination laws"); WIS. STAT. ANN. § 895.487(2) (West Supp. 2001) (reference violates state employment discrimination statute).

71 *See supra* note 70.

72 Robinson v. Shell Oil Co., 519 U.S. 337 (1997).

73 42 U.S.C. § 2000e(b) (1994).

74 MICH. COMP. LAWS ANN. § 423.452 (West 2001) (disclosure "specifically prohibited by a state or federal statute"); NEV. REV. STAT. ANN. § 41.755.3(f) (Michie 1999) (disclosure "in violation of a state or federal law").

75 ARK. CODE ANN. § 11-3-204(e) (Michie 2001). Under section 11-3-204(e), the immunity does not apply in the following circumstances: "[W]hen an employer or prospective employer discriminates or retaliates against an employee because the employee or the prospective employee has exercised or is believed to have exercised any federal or state statutory right or undertaken any action[s] encouraged by the public policy of this state." *Id.*

The "violation of law" provisions in these statutes make explicit what may be assumed in other statutes—the qualified immunity does not extend to illegal conduct. Specific reference to this issue also helps to define categories of conduct that constitute lack of good faith. This guidance, while helpful, may still leave questions. Where some states' provisions refer specifically to violations of other statutes as the standard of illegal conduct, the Michigan, Nevada and Arkansas statutes refer more generally to violations of "law or statute," or of the state's public policy. This language might be read to include actions contrary to judicial decisions and administrative regulations as violations of law that strip an employer's immunity. Otherwise, the legislature could have stated—as a few legislatures have—that the immunity does not apply where the employer violates statutory law. If legislatures intend to look beyond statutes to define violations of law, the statutes should make this clear. The Arkansas statute, which precludes immunity for statutory violations and violations of state public policy, illustrates this approach.[76]

3. *Disclosure of Confidential Information*

Under the Delaware, Georgia and South Dakota statutes, an employer loses immunity if the reference discloses confidential information.[77] The confidential nature of the information may arise from a nondisclosure agreement or state or federal law, local statute, rule or regulation.[78] Under the Nevada statute, where an employer forfeits immunity for a disclosure that violates an agreement with the employee,[79] broad language covers confidentiality agreements and other types of agreements as well. In these states, employers should exercise caution when disclosing truthful information as well as guarding against false statements. The reference immunity statutes in these states will not protect communication of truthful information in references where the information should be kept confidential by agreement or statute.

The confidentiality provisions should provide an added measure of protection for employees by requiring that employers honor agreements and employees' expectations that confidential information will not be used against them in an unfavorable job reference. Presumably, by excluding confidential material from the disclosure immunity, legislatures

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[76] *See supra* note 75.

[77] *See* DEL. CODE ANN. tit. 19, § 709(a) (Supp. 2000); GA. CODE ANN. § 34-1-4(b) (Michie Supp. 2001); S.D. CODIFIED LAWS § 60-4-12 (Michie Supp. 2001).

[78] DEL. CODE ANN. tit. 19, § 709(a) (Supp. 2000); GA. CODE ANN. § 34-1-4(b) (Michie Supp. 2001); S.D. CODIFIED LAWS § 60-4-12 (Michie Supp. 2001) (nondisclosure agreement or information that is confidential under state or federal law).

[79] NEV. REV. STAT. ANN. § 41.755.3(f) (Michie 1999) (providing that "[a]n employer is not immune from civil liability . . . if the employer . . . [d]isclosed information in violation of a state or federal law or *in violation of an agreement with the employee*")(emphasis added).

implicitly ensure that existing common law, contract or tort theories based on breach of confidentiality remain available to aggrieved employees. Similarly, the Nevada statute's more general provision covering any agreement encourages employers to honor agreements with their employees.[80] Thus, the confidentiality and agreement provisions of the Delaware, Georgia, Nevada and South Dakota statutes provide a measure of additional protection for employees.

4. *The Kansas Approach: Absolute and Qualified Immunity*

The Kansas legislation adopts a unique approach, providing absolute immunity as well as qualified immunity. The qualified immunity portion of the statute provides that "unless otherwise provided by law, an employer, or an employer's designee, who discloses information about a current or former employee to a prospective employer of the employee shall be qualifiedly immune from civil liability."[81]

However, the legislature failed to set forth in any portion of the statute how a plaintiff would prove that an employer does *not* qualify for the immunity. This omission creates difficulties. The statute provides neither employers nor employees with any notice or guidance of conditions necessary for retaining the immunity. In future sessions, the Kansas legislature should remedy this omission with an appropriate amendment.[82]

Absolute immunity protects employers in Kansas who disclose (1) dates of employment; (2) pay level; (3) job description and duties; and (4) wage history.[83] Absolute immunity also applies to the disclosure of (1) written evaluations conducted before departure and available to the employee;[84] and (2) indications of whether the employee was voluntarily or involuntarily released from her position and the reasons for the separation.[85] With the exception of disclosure of evaluations, voluntary or involuntary nature of the separation, and reasons for the separation, the information protected by the absolute immunity constitutes the basic neutral or "name, rank and serial number" reference. Such strategies, of course, are the ones adopted to avoid defamation claims. While a neutral or "name, rank and serial number" reference is unlikely to provide the

80 *See* NEV. REV. STAT. ANN. § 41.755.3(f) (Michie 1999).

81 KAN. STAT. ANN. § 44-119a(a) (2000).

82 Apparently, Kansas legislators noticed this problem. During the 1997 legislative session, Rep. Swenson introduced a bill to amend the section and repeal the existing section. The amendment would have rendered inapplicable all immunities – absolute as well as qualified – where an employer or prospective employer discriminated or retaliated against an employee or prospective employee who exercised federal or state statutory rights or who undertook action encouraged by Kansas public policy. The statute, however, has not been amended.

83 KAN. STAT. ANN. § 44-119a(b)(1)-(4) (2000).

84 KAN. STAT. ANN. § 44-119a(c)(1) (2000).

85 KAN. STAT. ANN. § 44-119a(c)(2) (2000).

basis for a defamation claim, the absolute immunity section may have been adopted to insulate employers from negligence claims regarding the release of neutral references and evaluations. This absolute protection, however, invites a possibility of abuse in situations where malicious or other false statements exist in an evaluation. Even absent abuse, conferring absolute immunity for statements in evaluations or explanations of termination can serve as a disincentive to assuring the accuracy of employment information and places the burden on the employee to attempt to correct any misinformation. Therefore, qualified immunity would serve more effectively to balance the concerns of employees as well as employers.

C. EVIDENTIARY STANDARD FOR PROVING LACK OF GOOD FAITH

Good faith, or lack of it, is the central, determinative factor in whether or not a reference provider benefits from the immunity. Under most statutes, a plaintiff must overcome a presumption that the employer acted in good faith.[86] The statutory presumption scheme places the burden of proof on the plaintiff, and her claim will fail if she cannot establish the requisite employer misconduct. Moreover, some states place a particularly heavy burden on plaintiffs, requiring clear and convincing evidence of the employer's lack of good faith.[87] While the preponderance standard applies in the majority of the reference immunity statutes,[88] the effectiveness, value and fairness of the higher standard of clear and convincing evidence is the subject of debate.

Proponents of the clear and convincing standard contend the higher standard of proof protects employers and encourages them to give refer-

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86 *Cf.* CAL. CIV. CODE § 47(c) (West Supp. 2001) (no good faith presumption).

87 FLA. STAT. ANN. § 768.095 (West Supp. 2002); IDAHO CODE § 44-201(1) (Michie 1997); ME. REV. STAT. ANN. tit. 26, § 598 (West Supp. 2000); MD. CODE ANN., CTS. AND JUD. PROC. § 5-423(b) (Michie 1998); S.D. CODIFIED LAWS § 60-4-12 (Michie Supp. 2001); TEX. LAB. CODE ANN. § 103.004(a) (Vernon Supp. 2002); UTAH CODE ANN. § 34-42-1(3) (1997); VA. CODE ANN. § 8.01-46.1.A (Michie 2000); WIS. STAT. ANN. § 895.487(c)(2) (West Supp. 2001).

88 Fifteen statutes expressly require the plaintiff to establish lack of good faith by a preponderance of evidence. ALASKA STAT. § 09.65.160 (Michie 2000); ARK. CODE ANN. § 11-3-204(a)(2) (Michie 2001); COLO. REV. STAT. ANN. § 8-2-114(3) (West Supp. 2001); GA. CODE ANN. § 34-1-4(b) (Michie Supp. 2001); HAW. REV. STAT. § 663-1.95(b) (Supp. 2000); 745 ILL. COMP. STAT. ANN. 46/10 (West Supp. 2001); IND. CODE ANN. § 22-5-3-1(b) (Michie 1997), LA. REV. STAT. ANN. § 23:291.A (West 1998); MICH. COMP. LAWS ANN. § 423.452 (West 2001); OHIO REV. CODE ANN. § 4113.71(B)(1)-(2) (Anderson 2001); OKLA. STAT. ANN. tit. 40, § 61.A (West 1999); OR. REV. STAT. § 30.178 (1999); R.I. GEN. LAWS § 28-6/4-1(c) (2000); TENN. CODE ANN. § 50-1-105 (2001 Supp.); WYO. STAT. ANN. § 27-1-113(a) (Michie 2001). Most statutes, however, do not specifically address the evidentiary standard for proving lack of good faith. One can assume that, where the statute does not expressly state the required burden of proof, the preponderance standard, which is the generally applicable burden of proof in civil litigation, applies. *See* KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE, § 339 at 574 (4th ed. 1992). *See also* Adler & Peirce, *supra* note 2, at 1422.

ences.[89] The more stringent evidentiary burden will discourage lawsuits and assuage employers' fears of suit,[90] thus allowing employers to feel free to provide references. In contrast, opponents of the clear and convincing evidence standard argue that the tougher evidentiary standard is too high, creating an insurmountable hurdle for plaintiffs.[91]

In reality, cautious employers are unlikely to vary their reference practices based on the evidentiary standards in a reference immunity statute, and some commentators argue that there is little practical difference between the two standards of proof. As one newspaper editorial writer notes:

> The lawyers may see a big difference between "preponderance of evidence" versus "clear and convincing evidence," but for most managers the difference is mush. Under a law using either wording, most lay people are still going to think twice about giving negative references, and they're probably still going to be circumspect if they do.[92]

Similarly, Professor Verkerke argues that in defamation cases, the burden of proof does not impact reference practices. He urges legislators to be "skeptical of reform proposals that would shift the quantum of proof required to show an abuse of the conditional privilege" because "no available evidence shows that substantially increasing or decreasing the burden of proof on defamation plaintiffs would generate a better balance between the quantity and quality of references."[93] Indeed, empirical research reveals that juries do not distinguish between the preponderance standard and the clear and convincing evidence standard in their decision making:

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89 *See, e.g., Law Could Restore Real Job References*, *supra* note 41, at A12 (supporting reference immunity bill with clear and convincing evidence standard, acknowledging that clear and convincing is higher standard than preponderance and arguing that "[a] higher standard is certainly needed" to encourage employers to give references).

90 *See, e.g.*, L.M. Sixel, *Name, Rank and Job References*, HOUSTON CHRON., Apr. 16, 1999, at 1 (arguing that decreasing the risk involved in giving references, legislature can "make it more difficult for former employees to sue by raising the burden of proof").

91 *See, e.g.*, Carlson, *supra* note 38, at 1C (stating that a clear and convincing standard virtually eliminates the right to sue and noting that the Minnesota Trial Lawyers Association has expressed concern); Catherine Candisky & Lee Leonard, *House Approves Job References Bill; Employers Would be Given Immunity*, COLUMBUS DISPATCH, Mar. 22, 1995, at 6B (stating that while "'[t]here is a legitimate need to protect employers from being sued over references, . . . [the proposed bill] requires a substantially tougher burden of proof than in other civil cases") (quoting Ohio state Rep. Bill Schuck who introduced a proposal to reduce the burden of proof in cases affected by bill to preponderance of the evidence).

92 *Getting Good Reference Shouldn't Be So Hard*, DAYTON DAILY NEWS, Mar. 27, 1995, at 10A (commenting on passage of Ohio house bill).

93 Verkerke, *supra* note 2, at 161.

> Judges and lawyers make two assumptions about the standards of proof. First is the assumption that jurors' probability estimates match their own. Second is their assumption that jurors can reliably distinguish between the standards and use them in their decision making. Although members of the court and bar may have a clear understanding of the distinction between these different standards and may be able to demonstrate the distinction between them, the subtle differences between the standards may be lost on jurors.[94]

In light of the empirical research, management perceptions, and scholarly observation, legislators who have emphasized the burden of proof may have expended substantial energy on an issue that may have little practical significance in changing reference policies and practices.

D. INFORMATION COVERED BY THE IMMUNITY

Generally, the statutes immunize disclosure of information regarding an employee's job performance and other work-related information, such as "professional conduct or evaluation"[95] or reasons for leaving a job.[96] Statutes vary in their descriptions of job performance. Some statutes refer to job performance with no explanation,[97] while others define

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94 *See, e.g.*, Joel D. Lieberman & Bruce D. Sales, *What Social Science Teaches Us About the Jury Instruction Process*, 3 PSYCHOL., PUB. POL'Y, & L. 589, 632-33. The authors' work cites empirical studies regarding participants' understanding of the differences between the legal standards of preponderance of the evidence, clear and convincing evidence and beyond a reasonable doubt. The results of the studies showed that jurors did not distinguish between the standards when presented in qualitative instructions. When jury instructions quantified the differences between the standards of proof, however, jurors were more successful in distinguishing the standards of proof and understanding the meanings of the standards. *Id.* at 633.

95 ARIZ. REV. STAT. ANN. § 23-1361C (West 2001); IDAHO CODE § 44-201(2) (Michie 1997); UTAH CODE ANN. § 34-42-1(1) (1997) (providing immunity for disclosure of information regarding "job performance, professional conduct, or evaluation"). South Carolina's statute also covers "written employee evaluations." S.C. CODE ANN. § 41-1-65(C)(1) (Law Co-op Supp. 2000).

96 KAN. STAT. ANN. § 44-119a(c)(2) (2000) (providing absolute immunity for employer's written response to prospective employer's written request of information – to which employee may have access – regarding whether employee "was voluntarily or involuntarily released from service and the reasons for separation"); S.C. CODE ANN. § 41-1-65 (Law Co-op Supp. 2000) (providing qualified immunity for employer's written response to prospective employer's request for information regarding whether employee "was voluntarily or involuntarily released from service and the reason for the separation); LA. REV. STAT. ANN. § 23:291.A (West 1998) (providing immunity for former employer who provides accurate information about a former employee's "reasons for separation"); MD. CODE ANN., CTS. & JUD. PROC.§ 5-423(a) (1998).

97 *See, e.g.*, ALASKA STAT. § 09.65.160 (Michie 2000); HAW. REV. STAT. § 663-1.95(a) (Supp. 2000); 745 ILL. COMP. STAT. ANN. 46/10 (West Supp. 2001); OHIO REV. CODE ANN. § 4113.71(B) (Anderson 2001); OKLA. STAT. ANN. tit. 40, § 61.A (West 1999); OR. REV. STAT. § 30.178 (1999); R.I. GEN. LAWS § 28-6.4-1(c) (2000); S.D. CODIFIED LAWS § 60-4-12

job performance in very specific terms.[98] Statutes also may enumerate other categories of work-related information in addition to job performance, such as illegal or wrongful conduct,[99] reasons for separation,[100] and general information regarding duration of employment, wage history and job description.[101]

(Michie Supp. 2001); TENN. CODE ANN. § 50-1-105 (2001 Supp.); WYO. STAT. ANN. § 27-1-113(a) (Michie 2001); *see also* CAL. CIV. CODE § 47(c)(3) (West 2001) ("job performance or qualifications"); WIS. STAT. ANN. § 895.487(1)(c) (West Supp. 2001) ("job performance or qualifications for employment"); *cf.* MO. REV. STAT. § 290.1521.2(2) (2000) (protecting disclosure of "the nature and character of service rendered" by an employee).

98 *See, e.g.*, Colo. Rev. Stat. Ann. § 8-2-114(1)(a)-(c) (West Supp. 2001) (defining job performance as: "suitability of the employee for reemployment; the employee's work-related skills, abilities, and habits that may relate to suitability for future employment; and [i]n the case of a former employee, the reason for the employee's separation"); DEL. CODE ANN. tit. 19, § 709 (b)(1)-(b)(3) (Supp. 2000) ("job performance or related characteristics . . . [a]ny act committed by such employee which would constitute a violation of federal, State or local law; or . . . [a]n evaluation of the ability or lack of ability of such employee or former employee to accomplish or comply with the duties or standards of the position held"); GA. CODE. ANN. § 34-1-4(b) (Supp. 2001) ("job performance, any act committed by such employee which would constitute a violation of the laws of this state if such act occurred in this state, or ability or lack of ability to carry out the duties of such job . . . "); LA. REV. STAT. ANN. § 23:291(C)(5) (West 1998) (defining job performance as including, but not limited to, "attendance, attitude, awards, demotions, duties, effort, evaluations, knowledge, skills, promotions, and disciplinary actions"); ME. REV. STAT. ANN. tit. 26, § 598 (West 2000) ("job performance or work record"); S.C. CODE ANN. § 41-1-65 (A)(5) (Law Co-op. 2000) (" '[j]ob performance' includes, but is not limited to attendance, attitude, awards, demotions, duties, effort, evaluations, knowledge, skills, promotions, and disciplinary actions"); TEX. LAB. CODE ANN. § 103.002(3) (Vernon Supp. 2002) (defining job performance as "the manner in which an employee performs a position of employment" and includes an analysis of the employee's attendance at work, attitudes, effort, knowledge, behaviors, and skills); VA. CODE ANN. § 8.01-46.1.C (Michie 2000) (providing that " 'job performance' includes, but is not limited to, ability, attendance, awards, demotions, duties, effort, evaluations, knowledge, skills, promotions, productivity and disciplinary actions").

99 *See, e.g.*, ARK. CODE ANN. § 11-3-204(a)(1)(G) (Michie 2001) ("[t]hreats of violence, harassing acts, or threatening behavior related to the workplace or directed at another employee"); NEV. REV. STAT. ANN. § 41.755.1(c) (Michie 1999) ("[a]n illegal or wrongful act committed by the employee").

100 *See, e.g.*, ARK. CODE ANN. § 11-3-204 (a)(1)(H) (Michie 2001); MO. REV. STAT. § 290.1521.2(3) (2000).

101 *See, e.g.*, ARK. CODE ANN. § 11-3-204(a)(1)(A)-(C) (Michie 2001); MO. REV. STAT. § 290.152.2(2) (2000) ("nature and character of service rendered . . . and the duration thereof"). The Arkansas immunity statute describes with great specificity the information that an employer may disclose. Subsection (a)(1) provides:

(A) Date and duration of employment;
(B) Current pay rate and wage history;
(C) Job description and duties;
(D) The last written performance evaluation prepared prior to the date of the request;
(E) Attendance information;
(F) Results of drug or alcohol tests administered within one (1) year prior to the request;
(G) Threats of violence, harassing acts, or threatening behavior related to the workplace or directed at another employee;

Other statutes speak in broader language, providing immunity from disclosure of "information" regarding employees.[102] This category could include a broad array of disclosures regarding employees, such as information about personal conduct away from the workplace that may not be limited, or relevant to, job performance.[103] The New Mexico statute permits disclosure on a more informal basis, covering "comments about job performance."[104] The statutes in Delaware and Georgia also protect employers who disclose an employee's violations of law to prospective employers. Neither the Delaware nor the Georgia statute limits the information to violations of law that occurred in the workplace or are otherwise work-related.[105]

Two statutes further specify that the information protected by the immunity must be truthful or believed in good faith to be truthful.[106] Five statutes provide that the employer's disclosure must be "fair and unbiased,"[107] "factual,"[108] "accurate,"[109] or "based upon credible evidence."[110] These additional qualifications may protect employees by fa-

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(H) Whether the employee was voluntarily or involuntarily separated from employment and the reasons for the separation; and

Whether the employee is eligible for rehire.

ARK. CODE ANN. § 11-3-204(a)(1) (Michie 2001).

102 *See, e.g.*, FLA. STAT. ANN. § 768.095 (West Supp. 2002); KAN. STAT. ANN. § 44-119a(b) (2000); 745 ILL. COMP. STAT. ANN. 46/10 (West Supp. 2001); TENN. CODE ANN. § 50-1-105 (Supp. 2001). In 1999, the Florida legislature broadened the statute's language on this issue. The language of the previous version used the more limited phrase, "information about . . . [an] employee's job performance." *See* FLA. STAT. ANN. § 768.095 (West Supp. 2002), Historical and Statutory Notes. *Cf.* VA. CODE ANN. § 8.01-46.1C (Michie 2000) ("'[i]nformation' includes, but is not limited to, facts, data and opinions").

103 *See* KAN. STAT. ANN. § 44-119a(a) (2000). Apparently, the qualified immunity provided in Kansas is designed to cover broad categories of disclosures, as the statute affords qualified immunity for an employer "who discloses information about a current or former employee to a prospective employer." *Id.* In the absolute immunity provisions of the Kansas law, the legislature chose specific language protecting disclosure of dates of employment, salary, job description and duties, and salary history. KAN. STAT. ANN. § 44-119a(b) (2000). Similarly specific language covers written evaluations conducted before departure that are available to the employee, information concerning whether the employee left the job voluntarily or involuntarily, and the reasons that the employee left her job. KAN. STAT. ANN. § 44-119a(c) (2000).

104 N.M. STAT. ANN. § 50-12-1 (Michie 2000).

105 DEL. CODE ANN. tit. 19, § 709(b)(2) (Supp. 2000) (covers federal, state or local laws); GA. CODE. ANN. § 34-1-4 (b) (2001) (includes only acts violating Georgia law which occurred in that state).

106 *See* 745 ILL. COMP. STAT. ANN. 46/10 (West Supp. 2001) ("truthful written or verbal information, or information that [the employer] believes in good faith is truthful"); TENN. CODE ANN. § 50-1-105 (Supp. 2001) ("truthful, fair and unbiased information").

107 *See* R.I. GEN. LAWS § 28-6.4-1(c) (2000); *see also* TENN. CODE ANN. § 50-1-105 (Supp. 2001) ("truthful, fair and unbiased information").

108 GA. CODE. ANN. § 34-1-4 (b) (2001).

109 LA. REV. STAT. ANN. § 23:291(A) (West 1998).

110 CAL. CIV. CODE § 47(c)(3) (West Supp. 2001).

cilitating rebuttal of the good faith presumption.[111] On the other hand, these requirements present potential factual issues that will require resolution by juries including the determination of what is "fair," "unbiased," "accurate," or "credible." These factual considerations can present a virtual minefield for employers that significantly weakens the protective shield of the immunity. Perhaps to avoid this problem, Michigan requires the information provided by the employer to be "documented in the [employee's] personnel file."[112] While this approach might clarify what information is protected, it also limits what is available for references and what prospective employers might find useful.

Commonly understood meanings of terms such as "job performance" may provide sufficient guidance regarding the information covered by the immunity statutes. To the extent that statutes cover information beyond work performance or work-related conduct, the immunity sweeps too broadly. The better approach confines the immunity to work-related information and encourages employers to focus on characteristics related to job performance and qualifications when they provide references. In addition, requirements of fairness and credibility ideally preserve the rights of employees. These requirements, however, may also provide grounds for litigation regarding what is fair or credible. This dilemma may be inevitable in any legislative solution to the "no comment" reference problem. Statutory provisions may still present grounds for litigation, leading employers back to the comfortable refuge of "name, rank and serial number."

E. DOES IMMUNITY APPLY ONLY TO REFERENCES PROVIDED IN RESPONSE TO A REQUEST?

In some instances, employers may share information about job applicants without receiving a formal request for a reference. For example, Employer A, who has a business or personal relationship with Employer B, may know that X, one of her current or former employees, has applied for a job with Employer B. In that situation, Employer A might, in the course of business dealings or social interaction, share negative thoughts about X's work or character with Employer B. If Employer B considers the unsolicited information and decides not to hire X, X may then sue

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111 A statute that protects information only if it is "accurate," however, may not be consistent with a presumption that the employer acts in good faith. Analyzing the Louisiana statute, one commentator observes that, given the accuracy requirement, the statute may not protect errors made in good faith. "What does 'accurate' mean? Does this mean that the statute does not cover information that is false, even if it was sincerely believed to be true? If so, employers in Louisiana who make a good faith error are not protected by this statute." Aron, *supra* note 15, at 1153.

112 MICH. COMP. LAWS ANN. § 423.452 (West 2001).

Employer A for disclosing the information when Employer B had not requested a reference.

In a common law defamation claim, Employer A may assert that the unsolicited communication is protected by the qualified privilege.[113] While a request for information is not a prerequisite to the application of the privilege, whether the information was requested or unsolicited is relevant to a determination that a communication "is within generally accepted standards of decent conduct" and therefore privileged.[114] Depending on the circumstances in which Employer A shared the information, she may lose the privilege if a jury determines that her conduct was not within generally accepted standards.

Employer A's privilege defense stands on even weaker ground if X sues her for tortious interference with business relations. Under this cause of action, an employer may be liable if she volunteers information about an employee without a request for information from a prospective employer.[115] The unsolicited response would be an unjustified interference with X's prospective employment with Employer B.

How do the reference immunity statutes deal with unsolicited information? The majority of statutes protect only those employers who provide references upon request. Most statutes provide immunity for information given at the request of either a prospective employer or a job applicant.[116] In ten states, the immunity specifically covers information requested by a prospective employer.[117] The New Mexico statute re-

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113 *See* discussion Part I, *supra* at pp. 8-10.

114 RESTATEMENT (SECOND) OF TORTS § 595(2)(a) (1977); *see also* KEETON ET AL., *supra* note 30, at § 115 ("The absence of a request is one factor to be considered in determining the propriety of the defendant's conduct").

115 *See* Long, *supra* note 23, at 902-04 (noting that the *Second Restatement* provides a privilege for truthful information or for advice honestly given in response to a request for advice. RESTATEMENT (SECOND) OF TORTS § 772 (1977)). To the extent the privilege relied upon is based upon honest advice, that advice "must be within the scope of a request" and "stray, unrequested statements or opinions may not be protected, and the provider may be liable if she volunteers them." Long, *supra* note 23, at 904.

116 *See*, e.g. ALASKA STAT. 09.65.160 (Michie 2000); COLO. REV. STAT. ANN. § 8-2-114(3) (West Supp. 2001); FLA. STAT. ANN. § 768.095 (West Supp. 2002); GA. CODE ANN. § 34-1-4(b) (Michie 2001); IDAHO CODE § 44-201(2) (Michie 1997); LA. REV. STAT. ANN. § 23:291.A (West 1998); MD. CODE ANN., CTS. & JUD. PROC. § 5-423(a)(1) (1998); MICH. COMP. LAWS ANN. § 423.452 (West 2001); MONT. CODE ANN. § 27-1-737 (2001); OHIO REV. CODE ANN. § 4113.71(B) (Anderson 2001); OKLA. STAT. ANN. tit. 40, § 61.A (West 1999) (also requires the employee's consent); OR. REV. STAT. § 30.178 (1999); R.I. GEN. LAWS § 28-6.4-1(c) (2000); S.D. CODIFIED LAWS § 60-4-12 (Michie Supp. 2001); TENN. CODE ANN. § 50-1-105 (2001 Supp.); TEX. LAB. CODE ANN. § 103.003(a) (Vernon Supp. 2002); WIS. STAT. ANN. § 27-1-113(2) (West Supp. 2001).

117 ARIZ. REV. STAT. ANN. § 23-1361.C (West Supp. 2001); ARK. CODE ANN. § 11-3-204(a)(1) (Michie 2001) (requires employee's written consent as well as request by prospective employer); MO. REV. STAT. § 290.152(2) (2000) (permitting employer to provide a written response to "an entity or person which the employer reasonably believes to be a prospective employer"); CAL. CIV. CODE § 47c (West Supp. 2001); 745 ILL. COMP. STAT.

quires the reference be given "upon request" without specifying who makes the request.[118] In Texas, the statute authorizes disclosure upon the request of either the employee or a prospective employer.[119] Maryland explicitly extends its immunity to requests by government authorities as well as requests by employees or prospective employers.[120] The Nevada statute provides immunity where an employee requests that the employer disclose information or where an employer discloses information to a law enforcement agency regarding a current or former employee who has applied for a position as a peace officer.[121]

The request requirement strikes a proper balance between the rights of employers and employees.[122] An employer who volunteers unsolicited negative information about an employee should be prepared to justify doing so, particularly in cases where the information is false or unsubstantiated. The most compelling cases for providing unsolicited negative information are situations involving dangerous or violent conduct in the workplace.[123] In those cases, the balance tips in favor of disclosure as a means of promoting and increasing workplace safety.[124] To provide a greater measure of protection to employees, however, care should be taken to assure that stray remarks, undocumented information,

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ANN. 46/10 (West Supp. 2001); S.C. CODE ANN. § 41-1-65(C) (Law Co-op Supp. 2000); UTAH CODE ANN. § 34-42-1(2) (1997); VA. CODE ANN. § 8.01-46.1.A (Michie 2000) (request by prospective or current employer). The Kansas absolute immunity for disclosure of written evaluations and information about the nature of and reasons for release also requires the request of a prospective employer.

118 N.M. STAT. ANN. § 50-12-1 (Michie Supp. 2000) ("When requested to provide a reference on a former or current employee, an employer acting in good faith is immune from liability for comments about the former employee's job performance . . . ").

119 TEX. LAB. CODE ANN. § 103.003(a) (Vernon Supp. 2002).

120 MD. CODE ANN., CTS. & JUD. PROC. § 5-423(a)(2) (1998) (immunity applies if employer is "requested or required by a federal, state, or industry regulatory authority or if the information is disclosed in a report, filing, or other document required by law, rule, order, or regulation of the regulatory authority").

121 NEV. REV. STAT. ANN. § 41.755(1)-(2) (Michie 1999). Subsection 2 refers to disclosures pursuant to Nev. Rev. Stat. § 239B.020, which pertains to reference requests by law enforcement agencies.

122 *But see* Aron, *supra* note 15, at 1152 (viewing request requirement as "imprudent").

123 *Compare* Cooper, *supra* note 2, at 326 (noting that justifiable disclosure would apply to "violent conduct that physically injured or posed a significant risk of physical injury to employees, customers or clients in the workplace" rather than mere "displays of anger, loss of temper, or frustration." *with* Aron, *supra* note 15, at 1152 (asserting that "[s]tatements made by a former employer compelled by a moral duty to divulge" are protected under common law immunity and should be protected under statutes). In lieu of a request requirement, Aron proposes the following: "the information must be requested unless the employer divulging the information has a compelling interest." *Id.* at 1163.

124 *See generally* Cooper, *supra* note 2.

and offhand comments receive proper scrutiny. Statutes that require written disclosure can promote this objective.[125]

F. WRITTEN INFORMATION REQUIREMENTS

Most reference immunity statutes do not require the employer to provide references in writing. The statutes in Kansas, Missouri, South Carolina and South Dakota, however, specify that immunity applies to written information.[126] In addition, the Missouri statute requires the responding employer to send a copy of any reference letter to the employee, and the employee may request a copy of the letter for up to one year following the date of the letter.[127] The Michigan statute requires protected disclosures be based on information "documented in the [employee's] personnel file."[128] In Illinois, the immunity covers "written or verbal information," but does not require protected references be in writing.[129]

Two statutes, which do not require written responses or written requests, do require employers to provide copies if written information is used in a reference. The Colorado and Indiana statutes require employers to send copies of any written communications to employees upon the employee's request. The requirement in Colorado applies to employers

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125 *See id.* at 325 (promoting a statutory "disclosure-shield" framework requiring the references to be in writing, with copies provided to employees for review, rebuttal, and explanation where needed).

126 The Kansas statute provides absolute immunity for disclosure of employee evaluations and information about the nature and reasons for the employee's separation from employment. To benefit from this immunity, the employer must respond in writing to a written request from a prospective employer, and any disclosed employee evaluations also must be in writing. KAN. STAT. ANN. § 44-119(c) (2000) (providing absolute immunity for such disclosures). In Missouri, immunity attaches to written responses to written requests for references. MO. REV. STAT. § 290.152.2 (2000). The South Carolina statute requires a written request and written response for immunity to apply to information other than dates of employment, pay level and wage history. S.C. CODE ANN. § 41-1-65(C) (Law Co-op Supp. 2000) (written employee evaluations; official personnel notices that record reasons for separation; voluntary or involuntary release information; reasons for separation; and information regarding job performance). The South Dakota legislation covers disclosure by employers in response to written requests of prospective employers or employees, and further requires the employer to make a copy of the written response available to the employee upon the employee's written request. S.D. CODIFIED LAWS § 60-4-12 (Michie Supp. 2001).

127 MO. REV. STAT. § 290.152.3 (2000).

128 MICH. COMP. LAWS ANN. § 17.63(2) (West 2001).

129 745 ILL. COMP. STAT. ANN. 46/10 (West Supp. 2001).

generally.[130] The Indiana statute requires the prospective employer to provide the copies to the employee.[131]

Writing requirements add a formality to the process that may improve the quality of reference information and reduce the potential for litigation. A written reference may be prepared more thoughtfully and carefully than one given during a conversation, which may reduce the possibility that a reference includes false or undocumented information. In addition, an employee who receives a copy of a written reference may have opportunities to correct or clarify information in discussions with the reference provider or during interviews with prospective employers. Having taken the time to prepare a written reference and to provide the information to the employee also should demonstrate the seriousness and good faith that the immunity requires. Additionally, written references may abate evidentiary problems in the event that litigation arises. Thus, the use of written references can serve to protect both employers and employees, as well as serving a societal interest in promoting accuracy and care.[132]

G. OBTAINING THE EMPLOYEE'S WRITTEN CONSENT

The Arkansas statute conditions reference immunity on the employer acting in good faith and obtaining the written consent of the current or former employee.[133] This written consent must be signed and dated by the employee.[134] The consent is valid only during the time the prospective employer is actively considering the applicant, and is valid for no longer than six months.[135]

This consent requirement mirrors a strategy that many employers adopted to defeat common law tort claims based on references: requiring employees sign a release that authorizes the employer to give a reference. Accordingly, many employers in Arkansas may already utilize releases and will not have to alter their practices significantly when it comes to

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130 COLO. REV. STAT. ANN. § 8-2-114(5) (West Supp. 2001) (employer who provides written information "shall send, upon the request of such current or former employee, a copy of the information provided to the last known address of the person who is the subject of the reference").

131 IND. CODE ANN.§ 22-5-3-1(c) (Michie 1997) ("Upon written request by the prospective employee, the prospective employer will provide copies of any written communications from current or former employers that may affect the employee's possibility of employment with the prospective employer.").

132 Immunity statutes with a writing *requirement*, however, may cut against the objective of encouraging references. Employers who believe a writing requirement is administratively burdensome or time-consuming may opt instead to continue to follow "name, rank and serial number" policies in lieu of relying on the qualified immunity.

133 *See* ARK. CODE ANN. § 11-3-204(a)(1) (Michie 2001). The statute specifically defines the kind of information that may be included in a reference. *See* discussion *supra* at note 101.

134 ARK. CODE ANN. § 11-3-204(b)(2) (Michie 2001).

135 ARK. CODE ANN. § 11-3-204(b)(3) (Michie 2001).

claiming the statutory immunity. However, the consent requirement may trap the unwary employer. Consent must comply with the language of the statute or the employer will not qualify for immunity. In addition, good faith alone is not sufficient if the employer fails to obtain the requisite written consent. Consequently, employers in Arkansas need to know not only that immunity may protect them, but that the protection is predicated upon obtaining the employee's consent in the fashion mandated by the statute.

The consent requirement raises concerns from the employee's perspective as well. The employee's consent should be fully informed. This objective is met if employees who sign releases know the categories of information that employers may provide under the statute. The statute defines specific categories of information that may be disclosed in references,[136] but the suggested consent language permits a broader authorization to provide "information with regard to my employment."[137] This raises the possibility that employees may not be aware of what is fair game in an employment reference. Perhaps the consent forms could refer to the statute or attach copies of the section describing the relevant information. This additional step, which would pose only an incremental burden for employers who already must obtain consent to benefit from the immunity, would help protect employees who consent to disclosure.

H. CAUSES OF ACTION DEFEATED BY IMMUNITY

While concern about defamation liability sparked the growth of "no comment" reference policies, reference immunity statutes cover other causes of action as well.[138] Most statutes cover any form of civil liability arising out of providing job references. Typical language protects employers who act in good faith from liability for disclosure of information;[139] disclosure *or* its consequences;[140] or disclosure *and* its

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136 *See* discussion *supra* at note 101.

137 *See* ARK. CODE ANN. § 11-3-204(b)(1) (Michie 2001).

138 *See, e.g.*, Long, *supra* note 23, at 900 (observing that although defamation claims are primary concern of legislatures enacting reference immunity statutes, negative references may also prompt claims for interference with business relations).

139 *See, e.g.*, MICH. COMP. LAWS ANN. § 423.452 (West 2001); S.C. CODE ANN. § 41-1-65 (Law. Co-op Supp. 2000); *see also* FLA. STAT. ANN. § 768.095 (West Supp. 2002); KAN. STAT. ANN. § 44-119a(B)-(C) (2000); WIS. STAT. ANN. § 895.487(2) (West Supp. 2001) ("immune from *all* civil liability that may result" [emphasis added]); OHIO REV. CODE ANN. § 4113.71(B) (Anderson 2001) ("not liable in damages in a civil action . . .").

140 *See, e.g.*, ALASKA STAT. § 09.65.160 (Michie 2000); ARIZ. REV. STAT. ANN. § 23-1361.C (West Supp. 2000); COLO. REV. STAT. ANN. § 8-2-114(3) (West Supp. 2001); DEL. CODE ANN. tit. 19, § 709(a) (Supp. 2000); IDAHO CODE § 44-201(2) (Michie 1997); ME. REV. STAT. ANN. tit. 26, § 598 (West Supp. 2000); OKLA. STAT. ANN. tit. 40, § 61.A (West 1999); OR. REV. STAT. § 30.178 (1999); S.D. CODIFIED LAWS § 60-4-12 (Michie Supp. 2001); UTAH CODE ANN. § 34-42-1(1) (1997); WYO. STAT. ANN. § 27-1-113(a) (Michie 2001) (emphasis added).

consequences.[141] The language of a small number of statutes does not confine immunity to civil actions.[142]

Most statutes focus on the liability of the reference provider to the person who is the subject of the reference. Immunity protects the disclosing employer from liability in tort and other civil actions brought by that employee. Two states, Louisiana and Ohio, go further in their efforts to protect employers from lawsuits arising out of job references.

The Louisiana statute extends immunity to prospective employers as well as employers who provide references. To be protected, the disclosing employer must provide the reference at the request of a prospective employer or the employee and provide accurate information about the employee's job performance or reasons for separation.[143] The protection for prospective employers is unique to Louisiana's reference immunity legislation.[144] The statute provides:

> Any *prospective employer* who reasonably relies on information pertaining to an employee's job performance or reasons for separation, disclosed by a former employer, shall be immune from civil liability *including liability for negligent hiring, negligent retention, and other causes of action related to the hiring of said employee*, based upon such reasonable reliance, unless further investigation, including but not limited to a criminal background check, is required by law.[145]

By expressly covering prospective employers as well as those who give references, Louisiana's statutory scheme takes into account employers' growing concern over negligent hiring and related claims. Employers may face liability for negligent hiring or negligent retention when an

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141 *See, e.g.*, 745 ILL. COMP. STAT. 46/10 (West Supp. 2001); IND. CODE ANN. § 25-5-3-1(b) Michie Supp. 2000); R.I. GEN LAWS § 28-6.4-1(c) (2000); TENN. CODE ANN. § 50-1-105 Supp. 2001) (emphasis added).

142 N.M. STAT. ANN. §50-12-1 (Michie Supp. 2000); *see also* GA. CODE. ANN. § 34-1-4 (Supp. 2001) (immunity language set forth in statute's caption—"Employer immunity for disclosure of information regarding job performance"—but not in text of statute); MD. CODE ANN., CTS. & JUD. PROC. § 5-423(a) (1998) ("may not be held liable for disclosing any information about the job performance or the reason for termination of employment . . ."). The language of these statutes provides a theoretically broad immunity that presumably extends to potential criminal liability as well.

143 LA. REV. STAT. ANN. § 23:291.A (West 1998). The disclosing employer is immune from civil liability and other consequences of the disclosure, provided the employer did not act in bad faith. An employer acts in bad faith by providing information that was "knowingly false and deliberately misleading." *Id.* However, the provision requiring disclosure of "accurate" information raises the possibility that an employer, who mistakenly—but in good faith—conveys false information, may not be protected. *See* discussion *supra* pp. 26-27.

144 My review of the statutes revealed no other state provides protection expressly for prospective employers.

145 LA. REV. STAT. ANN. § 23:291.B (West 1998) (emphasis added).

employee injures someone, and the injured person can prove the harm resulted from the employer's failure to carefully screen or supervise the employee.[146] An employer's best strategy for avoiding negligent hiring claims is to gather information regarding prospective employees.[147] The Louisiana statute theoretically limits exposure to negligent hiring and related claims by providing immunity to hiring employers who reasonably rely on information obtained in job references. Yet tension exists between the negligent hiring tort and the fear of defamation claims. Employers who wish to avoid defamation claims are likely to refuse to provide references, thus undermining the safety concerns and incentives for investigation underlying negligent hiring doctrine.[148]

The impact of Louisiana's prospective employer protection will depend on whether, as a result of the statute, employers provide useful references.[149] Investigation is key to avoiding liability for negligent hiring, however, "name, rank and serial number" references thwart prospective employers' information gathering efforts. If those who give references hold on to "name, rank and serial number" policies, the protection for prospective employers will have little practical significance.

The Ohio statute does not limit its protection to actions by the employee who is the subject of the reference. The statute immunizes an employer from liability to a "*prospective employer, or any other person*" when the employer discloses information regarding an employee's job performance at the request of the employee or a prospective employer.[150] Immunity extends to "any harm sustained as a proximate result of making the disclosure or of any information disclosed . . . ."[151] Accordingly, employers who provide references in Ohio can look to the immunity statute to shield them from liability for misrepresentation, negligence, and any other civil causes of action brought by a prospective employer or any other person who may be harmed by the reference.[152]

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146 *See* ROTHSTEIN ET AL., *supra* note 25, § 1.12, at 27-28.

147 *See, e.g.*, Saxton, *supra* note 1, at 76.

148 *See id.* Saxton observes: "If many (perhaps a majority of) employers adopt "no comment" reference policies, prospective employers of job applicants will often be frustrated in their efforts to conduct responsible background checks, and the social safety policies on which the 'negligent hiring' doctrine is grounded will likewise be undermined."

149 *Cf.* Aron, *supra* note 15, at 1156 (concluding that legislature may have included prospective employer protection on the grounds that such protection "will increase the flow of employment information because more prospective employers, desiring the immunity, may request such information").

150 OHIO REV. CODE ANN. § 4113.71(B) (Anderson 2001) (emphasis added).

151 *Id.*

152 Of course, the employer loses the immunity if the employee proves the reference was false, deliberately misleading, in bad faith, or with malicious purpose. OHIO REV. CODE ANN. § 4113.71(B)(1) (Anderson 2001). The employer also forfeits immunity for giving a reference that violates Ohio discrimination laws. OHIO REV. CODE ANN. § 4113.71(B)(2) (Anderson 2001).

This comprehensive protection, which addresses the full panoply of possible causes of action arising out of job references, should significantly reduce the risk that an employer will face liability for providing an employment reference. If employers can be confident that immunity statutes insulate them from liability from the range of actions that might arise from a job reference, they may feel more comfortable with exchanging references.

I. PERSONS COVERED BY THE STATUTES

Obviously, the statutes will affect employers and the people who work for them. What kind of organizations and what kind of workers fall within the ambit of the statutes? Many statutes provide only general guidance on the issue of who is defined as an employer or an employee.

Defining "employer" provides notice regarding the businesses, organizations, or entities eligible for the immunity. The definition also may specify whether the immunity extends to managers and other agents acting on an organization's behalf. Statutes may define "employer" by describing the forms of business considered to be employers, such as corporations or partnerships, or whether public sector employers are included as well as those in the private sector.[153] Because a business acts through its employees, definitions focusing solely on the nature of the business fail to provide a fully useful definition. The people who provide references may be managers, supervisors, or other staff members in human resources or personnel departments. The better definitions of "employer" reflect this aspect of the workplace and include persons acting on the employer's behalf.[154] Whether the reference provider acts on

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153 *See, e.g.*, GA. CODE ANN. § 34-1-4(a)(2) (Michie Supp. 2001) ("'Employer' means any individual engaged in a business, corporation, S-corporation, limited liability company, partnership, limited liability partnership, sole proprietorship, association, or government entity."); MICH. COMP. LAWS ANN. § 17.63(1)(b) (West 2001) ("a person who employs an individual for compensation or who supervises an individual providing labor as a volunteer"); MONT. CODE ANN. § 27-1-737 (2001) (covering disclosures by a "nonpublic employer").

Some statutes also define "prospective employer." *See, e.g.*, LA. REV. STAT. ANN. § 23:291.C(3) (West 1998) ("any 'employer' as defined herein, to which a prospective employee has made application, either oral or written, or forwarded a resume or other correspondence expressing an interest in employment"); MICH. COMP. LAWS ANN. § 17.63(1)(c) (West 2001) ("a person to whom an employee or former employee has submitted an application for employment").

154 *See, e.g.*, COLO. REV. STAT. ANN. § 8-2-114(4) (West Supp. 2001) (statute applies to "any employee, agent, or other representative of the current or former employer who is authorized to provide and who provides information in accordance with this section"); LA. REV. STAT. ANN. § 23:291.C(1) (West 1998) ("any person, firm, or corporation, including the state and its political subdivisions, *and their agents*, that has one or more employees, or individuals performing services under any contract of hire or service, expressed or implied, oral or written") (emphasis added); NEV. REV. STAT. ANN. § 41.755.4.(b) (Michie 1999) ("'Employer' includes an employee or *agent of an employer who is authorized by the employer to disclose information regarding an employee*") (emphasis added); OHIO REV. CODE. ANN.

the employer's behalf can be a critical issue. For example, co-workers may provide references for colleagues out of professional courtesy or friendship; they also may provide information about colleagues to prospective employers for similar reasons. Statutory definitions should make clear that where the reference provider acts on her own, her employer should not be held responsible for her reference.

Defining "employee" provides notice regarding the categories of workers whose ability to sue is limited by the reference immunity. Typically, the definitions are straightforward yet tautological, defining "employee" as a person who works for an employer.[155] Nevada includes current and former employees in its definition.[156] A few statutes define "prospective employee."[157] Some statutes move beyond circular definitions, covering persons who work for compensation,[158] or volunteers and other unpaid workers as well.[159] Given the expanding use of independent contractors and contingent workers in the modern workplace, statutory definitions of "employee" also should indicate whether references concerning part-time, temporary, and other contingent workers fall within the immunity.

Only a small number of reference immunity statutes define the terms "employer" and "employee." Statutes should not leave these key

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§ 4113.71(A)(2) (Anderson 2001) ("the state, any political subdivision of the state, any person employing one or more individuals in this state, *and any person directly or indirectly acting in the interest of* the state, political subdivision, or such person") (emphasis added); S.C. CODE ANN. § 41-1-65(A)(1) (Law Co-op Supp. 2000) ("[employers as defined] *and their agents that employ one or more employees. As used in this definition, 'agent' means any former supervisor or the employer's designee*") (emphasis added); WIS. STAT. ANN. §§ 895.487(1)(b), 101.01 (4) (West Supp. 2001) (" . . . as well as *any agent, manager, representative or other person having control or custody* of any employment, place of employment or of any employee.") (emphasis added).

155 *See, e.g.*, OHIO REV. CODE ANN. § 4113.71(A)(1) (Anderson 2001) ("an individual currently or formerly employed by an employer"); S.C. CODE ANN. § 41-1-65(A)(2) (Law Co-op Supp. 2000) ("any person employed by an employer").

156 *See* NEV. REV. STAT. ANN. § 41.755.4(a) (Michie 1999) ("'Employee' means a person who currently renders or previously rendered time and services to an employer").

157 *See, e.g.*, LA. REV. STAT. ANN. § 23:291.C(4) (West 1998) ("any person who has made an application, either oral or written, or has sent a resume or other correspondence indicating an interest in employment"); S.C. CODE ANN. § 41-1-65(A)(7) (Law Co-op Supp. 2000) ("any person who has made an application either oral or written or has sent a resume or other correspondence to a prospective employer indicating an interest in employment"). South Carolina includes a definition of "former employee" as well. § 41-1-65(A)(4) ("an individual who was previously employed by an employer").

158 *See, e.g.*, WIS. STAT. ANN. §§ 895.487(1)(a), 101.01(3) (West Supp. 2001) ("'Employee' means any person who may be required or directed by any employer, in consideration of direct or indirect gain or profit, to engage in any employment, or to go or work or be at any time in any place of employment.").

159 *See, e.g.*, LA. REV. STAT. ANN. § 23:291.C(2) (West 1998) ("any person, *paid or unpaid*, in the service of an employer") (emphasis added); MICH. COMP. LAWS ANN. § 423.451 (West 2001) ("an individual who as a *volunteer or for compensation* provides an employer with his or her labor") (emphasis added).

terms undefined. The statutes should define the categories of organizations that are protected when giving references as well as the categories of workers who will be affected by the immunity.

J. ATTORNEY'S FEES AND COSTS: FEE-SHIFTING OR "LOSER PAYS" PROVISIONS

The immunity statutes in Arizona and Ohio contain "loser pays" or fee-shifting provisions, making it possible for prevailing parties in reference claims to recover attorney's fees and costs.[160] Providing for payment of the prevailing party's attorney's fees and costs by the losing party contrasts the generally applicable "American rule" that parties pay their own litigation costs.[161]

Proponents of fee-shifting argue that a "loser pays" rule will have a significant impact in changing employers' job reference practices.[162] Win or lose, the costs of defending a lawsuit can be substantial. Because a defendant pays these substantial costs even if it ultimately prevails, the American rule encourages employers to rely on "name, rank and serial number" references to minimize the risk of litigation and its accompanying expenses.[163] In contrast, fee-shifting, with its potential recovery of legal fees, minimizes the risk of shouldering a large economic cost for successful defense of legitimate reference practices. In addition, fee-shifting can benefit employers by altering how potential plaintiffs approach litigation. Because a plaintiff faces the prospect of paying the defendants' attorney's fees if she loses the lawsuit, the "loser pays" rule should discourage frivolous claims.[164] For supporters of fee-shifting, recovery of legal expenses and a potentially reduced risk of suit combine to provide an effective means for easing employers' fears regarding the risks and costs of being sued.

The two state statutes featuring fee-shifting approach it in different ways. The Arizona statute mandates that courts award attorney's fees and

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160 ARIZ. REV. STAT. ANN. § 23-1361.I (West Supp. 2001); OHIO REV. CODE ANN. § 4113.71(c) (Anderson 2001).

161 *See, e.g.,* Saxton, *supra* note 1, at 76, 99; Adler & Peirce, *supra* note 2, at 1461-63.

162 *See, e.g.,* Saxton, *supra* note 1, at 76.

163 *See id.* at 76, 99; Adler & Peirce, *supra* note 2, at 1461-63.

164 *See* Saxton, *supra* note 1, at 99 & n.162 (arguing that fee-shifting in litigation based on unfavorable employment references will "discourage marginal claims"). *Cf.* Adler & Peirce, *supra* note 2, at 1461 (interpreting "American Rule" to provide "ready access to the courts even on novel and untested legal theories . . . [and] this easier access . . . means that court dockets will include numerous frivolous lawsuits that consume enormous amounts of time and waste many precious dollars of innocent defendants. This is particularly pertinent in employment-reference cases involving allegations of defamation because most employers eventually prevail, albeit often at great expense."). *Id.* at 1461-62.

costs to any prevailing party in an employment reference lawsuit.[165] Under this approach, both plaintiffs *and* defendants who win reference cases can recover the costs of litigation. In contrast, the Ohio statute's "loser pays" provision benefits prevailing defendants only.[166] Additionally, the Ohio legislation does not mandate the award of attorney's fees and costs in all cases. The fee-shift applies when the defendant prevails, and the court determines that the plaintiff's claim is frivolous.[167] Moreover, the statute *requires* the court to determine whether the lawsuit is frivolous *in every case in which the jury decides in the defendant's favor.*[168] If, after the mandated inquiry, the court decides the case is frivolous, the court then has discretion to order the plaintiff to pay the defendant's reasonable attorney's fees and costs.[169]

The language of the Ohio statute, which shifts fees only when the defendant prevails, is more accurately characterized as a "plaintiff pays," rather than a "loser pays" scheme. Apparently, concern over frivolous lawsuits drove the Ohio legislature to craft an unbalanced fee-shifting provision, heavily weighted toward the interests of employers. In contrast, the Arizona statute, which permits any prevailing party to recover attorney's fees and costs, creates a fee-shifting mechanism with incentives for employees and employers alike. The prospect of paying the prevailing party's litigation costs can discourage plaintiffs from pursuing

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165 ARIZ. REV. STAT. ANN. § 23-1361.I (West Supp. 2001) (providing that "[a] court *shall* award court costs, attorney fees and other related expenses to *any party that prevails* in any civil proceeding in which a violation of [the reference immunity law] is alleged.") (emphasis added).

166 OHIO REV. CODE ANN. § 4113.71(C) (Anderson 2001) (stating that the court may order the plaintiff to pay the prevailing defendant's attorney's fees and court costs, but the statute does not provide for a prevailing plaintiff to recover attorney's fees and costs from the defendant).

167 Section 4113.71(C) provides:

> If the court finds that the verdict of the jury was in favor of the defendant, the court shall determine whether the lawsuit . . . constituted frivolous conduct as defined in division (A) of section 2323.51 of the Revised Code. If the court finds by a preponderance of the evidence that the lawsuit constituted frivolous conduct, it may order the plaintiff to pay reasonable attorney's fees and court costs of the defendant.

OHIO REV. CODE. ANN. § 4113.71(C) (Anderson 2001).

> Section 2323.51(A) of the Ohio Revised Code defines frivolous conduct as follows:
> (1) "Conduct" means filing a civil action, asserting a claim, defense, or other position in connection with a civil action, or taking any other action in connection with a civil action.
> (2) "Frivolous conduct" means conduct of a party to a civil action or of his counsel of record that satisfies either of the following:
> (a)(i) It obviously serves merely to harass or maliciously injure another party to the civil action;
> (a)(ii) It is not warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law.

OHIO REV. CODE. ANN. § 2323.51(A)(1)-(2) (Anderson 2001).

168 OHIO REV. CODE. ANN. § 4113.71(C) (Anderson 2001) (emphasis added).

169 *See id.*

frivolous claims, discourage defendants from stonewalling with weak defenses, and encourage all parties to seriously consider settlement. If fee-shifting accomplishes these or similar objectives, reference claims can be resolved in an expeditious and cost-effective manner.[170]

Notwithstanding the arguments supporting fee-shifting, no legislatures other than those in Arizona and Ohio have included "loser pays" provisions in reference immunity statutes. Perhaps the practical concerns, potential overreach and unfairness, and other problems inherent in fee-shifting outweigh its theoretical appeal.

Compelling losers to pay prevailing parties' fees may be easier said than done. It is unlikely that many plaintiffs will have financial resources sufficient to pay a prevailing defendant's attorney's fees. The promise of relief for prevailing employers therefore is symbolic at best, so few employers will view a statutory fee-shifting provision as an adequate incentive to make the switch from "name, rank and serial number" to more open reference practices. Moreover, the fee-shifting proposal does not account for lost time and other non-compensable costs—such as negative impact on employee morale or adverse publicity for the employer's business—that can flow from litigation. While attorney's fees certainly form a large portion of the economic costs of litigation, concerns regarding lost time and other costs also underlie employers' fear of lawsuits.[171] In the best case scenario, a plaintiff may be able to pay the prevailing employer's fees, but she cannot reimburse the employer for the lost time and other negative impacts inherent even in a successful defense.

Discouraging frivolous lawsuits against employers is a key objective for providing that losing plaintiffs pay the fees of prevailing defendants. Here, fee-shifting mechanisms may overreach, discouraging meritorious as well as frivolous claims. The specter of paying employers' legal fees may lead potential plaintiffs to forego legitimate challenges to illegal reference practices especially given that not all losing plaintiffs lose because their claims are frivolous. Consequently, judicial discretion will be critical in limiting the award of fees to cases where justice requires such an award.

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170 Academic writers also support fee-shifting mechanisms as keys to changing employers' reference practices. *See, e.g.*, Saxton, *supra* note 1, at 100-07; Adler & Peirce, *supra* note 2, at 1461-63; Long, *supra* note 12, at 220-21; Schainblatt, *supra* note 15, at 740-41.

171 *See, e.g.*, O. Lee Reed & Jan W. Henkel, *Facilitating the Flow of Truthful Personnel Information: Some Needed Change in the Standard to Overcome the Qualified Privilege to Defame*, 26 AM. BUS. L.J. 305, 318 (1988). As Reed & Henkel observe: "[T]he fear of litigation which leads employers to turn off the spigot of employee-related information is a reasonable response from the employers' viewpoint. Litigation itself is an inefficient, costly, time-consuming process. Even when . . . defendants win, they lose, given the resource commitments required by even successful litigation." *Id.*

In short, any benefits to be gained from fee-shifting are likely to be outweighed by its negative consequences. It is not surprising, then, that "loser pays" provisions have not been included in the reference immunity statutes of most states. Unless the practical experience in Arizona and Ohio demonstrates otherwise, fee-shifting should remain outside the mainstream of reference immunity statutes.

K. RELATIONSHIP TO COMMON LAW

In many ways, the reference immunity statutes mirror elements of the common law qualified privilege, and the emerging case law views the legislation as a codification of existing common law principles.[172] In early cases, courts have used both statutory and common law privileges to adjudicate reference claims.[173] Employers also may rely on the common law privilege in cases in which the facts do not fall within the statute's requirements.[174]

Opponents of immunity statutes criticize the statutes as unnecessary duplications of existing, and more than adequate, common law protections for employers.[175] Advocates for employees argue that the legislation over-emphasizes the rights of employers at the expense of employees.[176] In addition, the legislative overlap with pre-existing common law privilege potentially brings confusion to the law and to the workplace.

Only six states—Arizona, Arkansas, Maine, Ohio, Oklahoma and Utah—address the interaction between the statutory immunity and existing common law principles relating to job references.[177] In Arizona

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172 *See, e.g.*, Linafelt v. Beverly Enterprises-Florida, Inc., 745 So. 2d 386, 388 (Fla. Dist. Ct. App. 1999); Thomas v. Tampa Bay Downs, Inc., 761 So. 2d 401, 405 (Fla. Dist. Ct. App. 2000). *See* discussion *infra* at pp. 47-49.

173 *See, e.g.*, Deutsch v. Chesapeake Ctr., 27 F.Supp. 2d 642, 645 (D. Md. 1998); Davis v. Bd. of County Comm'rs, 987 P.2d 1172, 1182; Bernofsky v. Adm'rs of Tulane Educ. Fund, No. 98-1792, 2000 U.S. Dist. LEXIS 5561 (E.D. La. Apr. 18, 2000), *aff'd* 253 F.3d 700 (5th Cir. 2001). *See* discussion *infra* pp. 50-54.

174 *See, e.g.*, Darvish v. Gohari, 745 A.2d 1134, 1139 (Md. Ct. Spec. App. 2000); *see* discussion *infra* pp. 56-57.

175 *See, e.g.*, Sturgeon, *supra* note 49, at 2 (arguments of opponents that protection already exists in court decisions); Backover, *supra* note 49, at 1 (according to trial lawyers and organized labor, reference immunity legislation constitutes "unnecessary repetition of Texas common law").

176 *See, e.g.*, Hicks, *supra* note 42, at 16 (reporting comments from Gordon McDonald of Nebraska AFL-CIO that immunity statute tips balance "too far in employers' favor"); *Wyoming References Law Could Hurt Employees*, 11 INDIV. EMPL. RIGHTS (BNA) 19 (July 30, 1996) (statute "gives protection to employers and not employees") (quoting Wyoming state Rep. Kenilynn Zanetti).

177 *See* ARIZ. REV. STAT. ANN. § 23-1361.D (West Supp. 2001); ARK. CODE ANN. § 11-3.204(d)(2) (Michie 2001); ME. REV. STAT. ANN. tit. 26, § 598 (West Supp. 2000); OHIO REV. CODE ANN. § 41173.71D (Anderson 2001); OKLA. STAT. ANN. tit. 40, § 62.C (West 1999); UTAH CODE ANN. § 34-42-1 (1997).

and Utah, the statutes provide that the statutory immunity does not alter any existing common law privileges.[178] Consequently, these statutes make clear that employers in Arizona and Utah can assert common law privileges as well as the privilege provided in the statutes. Retaining the common law privilege provides an added measure of protection for employers. Employers who fail to meet the requirements for statutory immunity will be able to assert common law privileges that do not have technical requirements.[179] While this is good news for employers, the overlap adds potential confusion and complexity to the litigation of job reference claims.[180]

In Arkansas and Maine, immunity statutes coexist with potential common law claims for employees as well as common law privileges for employers. The Arkansas statute provides that except as specifically amended by the statute, "the common law of this state remains unchanged as it relates to providing employment information on present and former employees."[181] Given the stringent requirements of the Arkansas statute, such as obtaining the employee's written consent for disclosure of specifically defined categories of information, a broad range of job reference cases in Arkansas most likely will be governed by common law principles. Outside the specific parameters of the statute, employees retain the right to bring common law tort claims, and employers can assert common law privileges.

The Maine statute leads to a similar result, although the language is less straightforward than the Arkansas statute. Maine's statute provides, "[t]his section is supplemental to and not in derogation of any claims available to the former employee that exist under state law and any protections that are already afforded employers under state law."[182] Because the statute provides that a claim under the immunity law "is supplemental to common law," by implication both statutory and common law claims are available.[183] The use of the phrase "not in derogation of" also supports this conclusion—the statute does not diminish an employee's common-law right to sue an employer.[184] Accordingly, it appears that tort claims remain an option for employees in Maine who receive unfavorable job references. In addition, employers retain their common law protections and privileges after the enactment of the Maine

178 *See* ARIZ. REV. STAT. ANN. § 23-1361.D (West Supp. 2001); UTAH CODE ANN. § 34-42-1(5) (1997).

179 *See* discussion *infra* at p. 58-60.

180 *See* discussion *infra* at p. 59 where the problems of applying the statutory immunity and the common law qualified privilege in the same case are considered.

181 ARK. CODE ANN. § 11-3-204(d)(2) (Michie 2001).

182 ME. REV. STAT. ANN. tit. 26, § 598 (West Supp. 2000).

183 *Id.*

184 *Id.*

immunity statute. Given the supplemental and non-diminishing status of the new law, it is difficult to conceive how the immunity statute clarifies the law, or affords significant protection to employers contemplating the litigation risks now inherent in providing job references.

In Oklahoma, the statute provides that "[f]ailure to comply with any provision of this section does not give rise to any liability or causes of action which did not exist prior to the effective date of this section.[185] This provision also implies that common law claims coexist with the statute, and plaintiffs may bring a common law claim, so long as they are not trying to create a *new* cause of action. By precluding new causes of action or theories of liability, the statute avoids creating an affirmative duty to provide references. Beyond this, however, plaintiffs are free to base their claims on the common law. However, the statute does not indicate whether a defense to common law claims exists. By leaving open the possibility of being sued under the common law, the legislature has limited the statute's effectiveness as an incentive for employers to adopt open reference policies.

The Ohio statute comprehensively addresses the relationship between statute and common law. Subsection 4113.71.D of the Ohio Revised Code provides:

> (1) This section does not create a new cause of action or substantive legal right against an employer.
> (2) This section does not affect any immunities from civil liability or defenses established by another section of the Revised Code or available at common law to which an employer may be entitled under circumstances not covered by this section.[186]

Subsections (1) and (2) reinforce the nature of the statute as a shield for employers who provide references. By emphasizing that the statute creates no new causes of action or substantive legal right against employers, subsection (1) makes it clear that the statute's purpose is to protect reference providers, rather than provide new avenues for lawsuits by aggrieved employees, prospective employers and other claimants who believe they have suffered harm arising out of an employment reference. Similarly, by stating that employers retain all common law immunities and defenses in circumstances not covered by the statute, subsection (2) accentuates the legislation's purpose as an employer protection measure.[187] This section also clarifies that the statute does not abrogate com-

185 OKLA. STAT. ANN. tit. 40, § 61(C) (West 1999).

186 OHIO REV. CODE ANN. § 4113.71(D) (Anderson 2001).

187 Compare the relationship section with the fee-shifting provision, see discussion *supra* pp. 37-40. The comparison underscores that the Ohio statute is very much weighted toward the interests of employers.

mon law defenses in circumstances not covered by the immunity law. For example, an employer who volunteers reference information rather than responding to a prospective employer's request would not be protected by the statutory immunity. In that situation, the employer would be able to assert existing common law defenses to the reference claim. The immunity statute appears designed for a narrow, prescribed set of circumstances, with situations outside of the statute governed by the common law.

Except for the statutes discussed in this section, reference immunity legislation does not address the relationship between the statutory and common law causes of action. Case law may provide some guidance. Thus far, Florida courts provide the clearest direction, holding that the statute applies to statements about "job performance" and common law privileges apply to other communications in the workplace.[188] Other cases analyzing state reference immunity statutes have not addressed the interaction or relationship between the statutory and common law privileges.[189]

Although the statutes intend to decrease the threat of litigation, providing concurrent statutory and common law privileges and remedies has the opposite effect. Neither employers nor employees will have a clear understanding regarding whether legislation or common law controls in a job reference case. If that is the case, we can expect increasing complexity in job reference cases, with plaintiffs and defendants alleging multiple and duplicative theories under the common law and under the statutes.

Moreover, most of the statutes offer little more than a codification of the common law defamation privileges. For example, in Florida—one of the earliest states to adopt an immunity statute—the courts explicitly have labeled the statute as "the Legislature's codification of the common law."[190] These longstanding, preexisting common law privileges have been ineffective in reducing employers' fear of being sued. Codifying similar privileges is unlikely to encourage significant changes in prevailing reference practices. In addition, where the relationship between the statutes and the common law remains unclear, confusion is the likely result.[191]

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188 *Linafelt*, 745 So. 2d at 388; *see also Thomas*, 761 So. 2d at 405; *see* discussion *infra* pp. 47-49.

189 *See* discussion *infra* pp. 58-60.

190 *Linafelt*, 745 So. 2d at 388. *See also Thomas*, 761 So. 2d at 405 (referring to statute as "the legislative codification of the common law qualified privilege in defamation cases as it relates to comments about job performance").

191 *See Linafelt*, 745 So. 2d at 389. In that case, issues of statutory and common law privilege were submitted to the jury. In reaching its verdict in favor of the plaintiff, the jury did not address the statute's higher standard of proof, which was a controlling issue in the case. Both the trial court and appellate court noted that "there was a great deal of confusion at trial

To promote clarity in the law for both employers and employees and to further the goal of encouraging employers to provide references, the immunity statutes should serve as the exclusive law governing the employer's qualified privilege in job reference cases.[192] The legislatures should not wait for the courts' interpretations. The statutes should state this expressly.

IV. REFERENCE IMMUNITY STATUTES: A GROWING TREND WITH NO IMPACT ON EMPLOYMENT REFERENCE PRACTICES

A. THE ENDURING POWER OF "NAME, RANK, AND SERIAL NUMBER"

Since 1995, legislatures have looked to reference immunity statutes as the antidote to the problem of "name, rank and serial number" references. Armed with the statutory shield, employers would freely provide references upon request. Anecdotal reports from the states, however, suggest otherwise. Recent articles in law journals, human resource management publications, and legal newsletters indicate only minor—if any—changes in the advice given to employers in states with immunity statutes.[193] Despite the growing number of immunity statutes, many employers continue to believe the wisest course is to provide nothing more than "name, rank and serial number" when responding to requests for references. In interviews with personnel managers, Halbert and Maltby found that "the hiring professionals we spoke to . . . repeatedly told us that the fear of being sued remains as strong as ever" in states with reference immunity statutes.[194] Regarding the effectiveness of the immunity laws, Halbert and Maltby concluded that "at this point, the laws appear to be having little or no effect."[195] Other scholars and journalists have reached similar conclusions.[196]

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concerning the common law and statutory privileges and that the jury's verdict was, in part, a product of this confusion," *id.* at 389, n.1.

192 *See also* Aron, *supra* note 15, at 1164. Aron's suggestions for reform of the Louisiana immunity statute include amending the statute to provide that it "is the exclusive remedy and is not supplemental to any protections that are already afforded employers under state law," *id.* With the statute as the exclusive remedy for job reference cases, "a unified body of case law [could] develop in this area of the law, in that the parties must use the statutory protections and immunities to the exclusion of the former case law." *Id.*

193 *See supra* notes 51-52 and accompanying text.

194 Halbert & Maltby, *supra* note 1, at 411.

195 *Id.* The authors' assertions were based on surveys on reference checking and the authors' interviews with hiring professionals.

196 *See, e.g.*, Verkerke, *supra* note 2, at 132 (arguing that the statutes are a modest reform and do little to change the status quo, and that "a plain reading of the language commonly used in these statutes suggests that dramatic change is unlikely."); Ellen Forman, *Truth or Consequences: Divulging a Former Employee's Unacceptable Work Performance Can Open a Pandora's Box for Any Company*, FT. LAUDERDALE SUN-SENTINEL, Jan. 6, 1997, at 3, 1997 WL 3078681 (observing that although Florida has a reference immunity statute, "many companies

Why do the statutes have virtually no impact on employers' reference practices or the advice that employers receive from lawyers and human resource professionals? The objective of statutory immunity is to shield employers from liability, thereby encouraging employers to give references. For a number of reasons, meeting this objective may be more difficult than legislators anticipated.

While the statutes do offer immunity from liability, this protection may not be sufficient for many employers who are concerned with avoiding lawsuits or threatened lawsuits. For these employers, the promise of immunity from liability fails to adequately address their concerns about the costs of being sued, even though immunity can strengthen the odds that the employer ultimately prevails. As one attorney has observed, a reference immunity statute "is pretty good legal protection to win the lawsuit, but it's not protection from being sued."[197] Consequently, as the following advice from an industry newsletter indicates, employers and their advisors may not be convinced that the statutes provide reliable protection:

> [D]on't rely on job reference immunity statutes – legislation to immunize employers who provide references for former employees. These rules generally require that the employer act in "good faith" and provide only "truthful" information. Such ambiguous language . . . hasn't yet been tested, and employers may still get into litigation over negative or incomplete references.[198]

In any event, employers most likely would prefer not to be the defendant in a case testing the scope of statutory immunity. Moreover, the immunity is not likely to be perceived by employers as providing additional protection in the event of a lawsuit. For the most part, the statutes

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are still sticking to confirmation of employment, position, dates of employment and salary"); Jeff Richgels, *Giving References Has Become a Sticky Wicket*, MADISON CAPITAL TIMES, Feb. 12, 1997, at 1C ("while the [Wisconsin reference immunity statute] may prevent someone from winning a suit it doesn't prevent them from bringing one . . . [w]hich is a big incentive to stick to name, rank and serial number"); Ron Carter, *Mum's Still the Word: New Law Hasn't Shaken Loose Employee Reference Information*, COLUMBUS DISPATCH, Dec. 23, 1996, at 1 (observing that "there is little evidence yet that much has changed" in employment reference practices since the passage of the Ohio reference immunity statute).

197 Ellen Forman, *supra* note 196, at 3 (quoting Allan Weitzman, a labor attorney in Boca Raton, Florida).

198 *References – Walking a Thin Legal Line; Industry Trend or Event*, OFFICE SOLUTIONS, Jan. 1, 2001, at 9. For similarly skeptical views, *see, e.g.*, Steven Oberbeck, *Employers Still Cautious About Giving References: Past is Taboo for Employers Despite Law*, SALT LAKE TRIB., Oct. 6, 1996, at E1; Sixel, *supra* note 90, at 1 (discussing a lawyer's testimony in support of Texas reference immunity legislation, and noting he would continue to advise his clients who wished to avoid litigation to "not say anything about their former employees other than their dates of service and position held" even after passage of statute).

mirror and codify the common law privilege, a privilege which has been ineffective in deterring the use of "name, rank and serial number" policies. The language of the statutes also provides grounds for caution and skepticism among employers. Some statutes state that the new laws do not abrogate any common law rights to sue.[199] Legislative silence on this issue leaves courts with the task of deciding whether plaintiffs may bring common law claims as well as statutory ones.[200] The possibility that an employer may face both statutory and common law claims in a job reference case is unlikely to give employers confidence that the statutes protect them. Moreover, even if the statutes are effective, many employers—particularly small businesses and others without ongoing relationships with lawyers or human resource professionals—may be unaware of their existence.[201] This combination of factors hardly bodes well for a sea of change in reference practices in the workplace.

The statutes, of course, are a relatively recent legal development. With the passage of time, perhaps employers may become increasingly aware of the statutes and more willing to rely on the immunity. A few well-publicized job reference cases in which employers prevail by invoking the statutory immunity may convince employers that the statutes indeed protect them. Equally important are efforts to educate employers about the statutes. Media and business and professional organizations should take part in getting information to employers so that employers are aware of how the statutes can protect them.

While increasing employers' knowledge and awareness of the statutes is a start, changing employers' reference practices may yet require more than knowledge of the statutes and well-publicized employer victories. Given the choice between avoiding litigation and winning a case because of qualified immunity, however, most employers would likely choose to avoid litigation altogether. Immunity statutes notwithstanding, employers who do not want to risk litigation are likely to continue to take the safest route by adhering to "name, rank and serial number" and neutral reference policies for the foreseeable future.

B. CASE LAW INTERPRETATIONS OF REFERENCE IMMUNITY STATUTES

Most reference immunity statutes have been in effect for a relatively short time. Consequently, only a small number of reported cases cite reference immunity statutes. Appellate courts have discussed reference

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199 *See supra* notes 181-186 and accompanying text.

200 *Cf.* Peter Tiersma, *The Language of Silence,* 48 RUTGERS L. REV. 1, 87 (1995) (discussing legal significance of legislative silence in statutory interpretation and observing that "congressional silence intentionally or unintentionally creates a gap that the courts must somehow fill").

201 *See* Cooper, *supra* note 2, at 313.

immunity statutes in six states that were among the first to enact reference immunity legislation: Florida (statute in effect since in 1991); Indiana (statute in effect since 1995); New Mexico (statute in effect since 1995); Tennessee (statute in effect since 1995); Maryland (statute in effect since 1996); and Iowa (statute in effect since 1997). In addition, three federal district courts have decided cases involving reference immunity statutes.[202]

Florida

The case law review begins with Florida, the first state legislature to enact a reference immunity statute.[203] Florida courts interpret the statute as an affirmative defense to claims arising out of job references.[204] Common law privileges govern lawsuits based on workplace communications other than job references.[205]

For example, in *Linafelt v. Beverly Enterprises-Florida, Inc.*,[206] William Linafelt alleged defamation and intentional interference with a business relationship after receiving a negative employment reference.[207] A prospective employer testified that Beverly Enterprise provided a reference stating that Linafelt had committed a "conduct violation." As a result of this "conduct violation," Beverly declared Linafelt ineligible for rehire and barred him from its premises.[208] While the jury decided in Linafelt's favor, the trial court granted Beverly's motion for directed verdict.[209] Linafelt appealed.

In its analysis of Linafelt's defamation claim, the Florida court of appeal stated the case was governed by the reference immunity statute because the alleged defamatory communication related to Linafelt's "job performance."[210] Describing the statute as "the Legislature's codification of the common law," the court noted that the statute provides an affirmative defense to a claim arising out of a job reference.[211] The court

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202 These courts have interpreted the reference immunity statutes of Louisiana and Maryland. *See* discussion *infra* pp. 50-51 and 53-56.

203 The analysis necessarily is preliminary given the currently small number of reported cases. I believe, however, that examining the current state of the case law provides a foundation for considering the potential impact of immunity statutes on job reference claims.

204 *See infra* note 211 and accompanying text.

205 *See infra* notes 215-219 and accompanying text.

206 Linafelt v. Beverly Enterprises-Florida, Inc., 745 So. 2d at 386 (Fla. Dist. Ct. App. 1999).

207 *Id.* at 388. Linafelt's suit also included a cause of action for breach of employment contract. The contract claim was dismissed. *Id.* (citing Linafelt v. Beverly Enterprises-Florida, Inc., 662 So. 2d 986) (Fla. Dist. Ct. App. 1995)).

208 *Id.* at 387-88.

209 The trial court also denied Linafelt's motion for a new trial on the issue of punitive damages. *Id.*

210 *Id.* at 388.

211 *Id.*

emphasized that the statute, with its clear and convincing evidence standard, places a higher burden of proof on plaintiffs in reference cases than the burden imposed under the common law for cases that do not involve references.[212] The court found that the jury had received incorrect instructions on the common law and statutory privileges. The jury determined the "conduct violation" statement was not related to job performance and thus did not address whether Linafelt had established, with clear and convincing evidence, Beverly's lack of good faith. In a footnote, the court observed "the trial court recognized that there was a great deal of confusion at the trial concerning the common law and statutory privileges and that the jury's verdict was, in part, a product of this confusion."[213] In any event, the court found that the "conduct violation" statement was true, and affirmed the directed verdict in Beverly's favor on the defamation claim.[214]

The court expressed similar concerns regarding the jury's failure to apply the clear and convincing evidence standard in assessing Linafelt's claim for intentional interference with business relations. Noting that the jury had not rendered its verdict "under the controlling law" that required a showing of clear and convincing evidence, the court remanded the case for a new trial on the tortious interference claim.[215]

The Florida court of appeal again analyzed the statutory and common law privileges in *Thomas v. Tampa Bay Downs, Inc.*[216] Charles Thomas sued Tampa Bay Downs racetrack and the Thoroughbred Racing Protective Bureau for defamation. Thomas based his defamation action on two incidents. First, Thomas alleged he was defamed by statements made in a report prepared by the racetrack's director of security and disseminated to members of the Protective Bureau.[217] Second, Thomas claimed he was defamed by statements allegedly made by the security director to a prospective employer who had requested a job reference.[218]

The defendants' affirmative defenses included qualified privilege. The court applied the common law privilege to the circulation of the

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212 *Id.* at 388-89.

213 *Id.* at 389 n.1.

214 *Id.*

215 *Id.* at 390.

216 Thomas v. Tampa Bay Downs, Inc., 761 So. 2d 401 (Fla. Dist. Ct. App. 2000).

217 *Id.* at 403. The report detailed allegations that Thomas had made false representations and "duped" a woman who responded to an employment classified ad. In his complaint, Thomas also charged that the director of security, Robert Kibbey, was "spreading rumors that [Thomas] had transported three women to the Crescent City for immoral and improper purposes." *Id.*

218 *Id.* In an affidavit, the prospective employer asserted Kibbey told him that Thomas "had run an advertisement seeking female trainers, whom he then transported to New Orleans and pimped for their services." *Id.* The affidavit also stated that Kibbey said Thomas "had engaged in identical conduct with his former wife." Kibbey denied making the statements alleged. *Id.*

report to the Protective Bureau and affirmed summary judgment in favor of the defendants.[219] However, with respect to the job reference claim, the court held that factual questions existed as to whether the statements had been made. The court reversed the grant of summary judgment, but it noted that if the jury found that the security director had made the alleged statements in good faith, he would be protected by the statute.[220] The court again described the statute as "the legislative codification of the common law of qualified privilege in defamation cases" that "relates to comments about job performance which are presumed to have been made in good faith."[221]

Indiana

An Indiana appellate court analyzed the state reference immunity statute in *Steele v. McDonald's Corp.*[222] Victor Steele sued McDonald's, alleging that McDonald's disclosed his status as a convicted felon in violation of a promise to keep the information confidential. The events leading up to the disclosure began with a fight between Steele and a co-worker at McDonald's. Steele maintained the co-worker attacked him, and Steele fought back only in self-defense. McDonald's fired Steele, and he subsequently obtained a job at a Kroger grocery store. He did not inform Kroger that he had a felony conviction, but an unidentified McDonald's employee informed the Kroger security office that Steele was a convicted felon. Kroger then fired Steele.[223]

Steele, a *pro se* litigant, alleged fraud against McDonald's for breaching a promise to keep his felon status confidential. The court quickly disposed of Steele's fraud claim and affirmed the trial court's grant of judgment on the pleadings. Observing that the misrepresentations alleged by Steele were "'not the stuff of which a fraud recovery is made,'" the court also held that the Indiana reference immunity statute protected McDonald's from civil liability for the disclosure of the truthful information concerning Steele's felon status.[224]

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219 *Id.* at 404-05.

220 *Id.* at 405.

221 *Id.*

222 Steele v. McDonald's Corp., 686 N.E.2d 137 (Ind. Ct. App. 1997).

223 *Id.* at 140-41.

224 *Id.* at 141-43. Some reference immunity statutes do not protect disclosures of confidential information. Under those statutes, disclosure of confidential information rebuts the presumption of good faith. *See* discussion *supra*, at Part III.B.3. While Steele may have fared better in a state with a confidentiality provision, it is not clear whether he had sufficient facts to support his claim that McDonald's had promised him confidentiality.

Louisiana

In Louisiana, one court discussed the state reference immunity statute without providing detailed analysis. In *Bernofsky v. Administrators of Tulane Educational Fund*,[225] Dr. Carl Bernofsky sued his former employer, Tulane University Medical School ("Tulane"), for defamation and other claims arising out of requests for employment references.[226] Bernofsky had a history of litigation against Tulane, having unsuccessfully sued the medical school for race discrimination, age discrimination and a number of state law claims arising out from his termination.[227] While the wrongful discharge litigation was pending in the district court, Bernofsky applied for other jobs and listed the names of faculty members at Tulane as references.[228]

In response to a reference inquiry from the University of Houston, the faculty members referred the request to Tulane's in-house counsel, who responded with a carefully worded letter. The letter explained that, due to Bernofsky's pending litigation, counsel had directed the faculty members to not respond to reference requests concerning Dr. Bernofsky. The text of the letter provided, in pertinent part:

> I have directed Dr. Karam that [he and other faculty members] should not respond to any request relative to Dr. Bernofsky because of pending litigation brought by Dr. Bernofsky against Dr. Karam personally and against the University.
>
> I can confirm that Dr. Bernofsky was a research professor at Tulane whose position was eliminated because Dr. Bernofsky no longer had any research funds to support his position. His dismissal was not based on any performance issues, but was strictly a financial decision due to lack of research funds.
>
> Lack of a response from [the faculty members] personally should not indicate any negative information rela-

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225 Bernofsky v. Adm'rs of Tulane Educ. Fund, No. 98-1792, 2000 U.S. Dist. LEXIS 5561 (E.D. La. Apr. 18, 2000), *aff'd* 253 F.3d 700 (5th Cir. 2001).

226 Bernofsky's lawsuit also claimed that Tulane's conduct regarding employment references constituted retaliation in violation of 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964. *Id.* at *2.

227 *Id.* Bernofsky's termination claims were dismissed on summary judgment, and that judgment subsequently was affirmed on appeal. Bernofsky v. Tulane Univ. Med. Sch., 962 F. Supp. 895, 897 (E.D. La. 1997), *aff'd*, 136 F.3d 137 (5th Cir. 1998).

228 Bernofsky v. Adm'rs of the Tulane Educ. Fund, No. 98-1792, 2000 U.S. Dist. LEXIS 5561, at *9-10 (E.D. La. Apr. 18, 2000). The court noted that Bernofsky listed the faculty members as references "without requesting their permission or even notifying them that he had done so." *Id.* Moreover, Bernofsky's complaint included "pervasive, specific and personal" allegations against Dr. Jim Karam, one of the persons whom Bernofsky listed as a reference. *Id.* at *8-9.

> tive to Dr. Bernofsky, but is necessitated because of the pending litigation.[229]

Bernofsky argued that the letter was inaccurate to the extent that it indicated that he had sued Dr. Karam personally and that there were no research funds to support his position.[230] The court, applying Louisiana law, disagreed, finding that the remarks were neither inaccurate nor defamatory.[231] Further, the court found that even if the remarks were false and defamatory, Tulane still prevailed on the grounds of qualified privilege. Tulane asserted both the common law privilege and the privilege under the state reference immunity statute. With regard to the common law privilege, the court found that Bernofsky failed to prove malice and that the statements were made in good faith.[232] The court concluded its opinion by addressing Tulane's argument that it was entitled to protection under the reference immunity statute and Bernofsky's counterargument that the statutory immunity was not available. Although the court quoted language from the statute,[233] the opinion furnishes no specific analysis of the statute or its role in the outcome of the case.[234] Thus, while Tulane prevailed on summary judgment, the opinion provides little guidance for courts and litigants in future cases involving the Louisiana reference immunity statute.

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229 *Id.* at *10-11.

230 *Id.* at *32-33.

231 *Id.* at *32.

232 *Id.* at *35-36.

233 The court quoted LA. REV. STAT. ANN. § 23:291A (West 1998), which provides:

> Any employer that, upon request by a prospective employer or a current or former employee, provides accurate information about a current or former employee's job performance or reasons for separation shall be immune from civil liability and other consequences of such disclosure provided such employer is not acting in bad faith. An employer shall be considered to be acting in bad faith only if it can be shown by a preponderance of the evidence that the information disclosed was knowingly false and deliberately misleading.

Id. at *36-37.

234 By the conclusion of the opinion, the court seems exasperated with the litigious Dr. Bernofsky. The court writes:

> Bernofsky argues that [the statutory] immunity is not available to Tulane because there is an issue of fact as to whether the statements made by [in-house counsel] were accurate or knowingly false and deliberately misleading. He then provides seven pages of familiar fact to establish that Bernofsky's academic performance was not unsatisfactory and that he did not consistently fail to generate grant funds prior to his termination at Tulane.
>
> Dr. Bernofsky may have a deep-seated and heartfelt need to relitigate the issue of why he was terminated at Tulane. However, his opportunity has come and gone. He can not resurrect the issue in the carefully worded letter from Tulane to Bernofsky's friend at UH . . . .

Id. at *37.

New Mexico

The New Mexico Court of Appeals cited the statute in its analysis of *Davis v. Board of County Commissioners*.[235] Plaintiff Mariah Davis alleged that while she was a patient at Mesilla Valley Hospital, Joseph Herrera, a mental health technician at the hospital, physically abused, sexually assaulted, and sexually harassed her.[236] Herrera's former employer, defendant Dona Ana County Detention Center, had given Herrera an unqualified, favorable reference when he applied for his job at the hospital. The Detention Center recommended Herrera without qualification even though the Detention Center had investigated and disciplined Herrera for repeated instances of sexual harassment.[237] Davis sued the County for negligent misrepresentation, alleging that misleading information in the reference led the hospital to hire Herrera, and as a result, Hererra assaulted Davis.[238] The events in *Davis*, however, occurred before the statute took effect. Because the statute does not apply retroactively, the statute did not govern the *Davis* case.[239] While the court ultimately "[did] not construe the statute's meaning because it [was] not directly before [the court]," the court observed that the New Mexico statute "would appear to track much of the common-law privilege relating to defamation and good-faith comments in the employment context."[240]

Tennessee

The Tennessee Supreme Court interpreted the state reference immunity statute in *Sullivan v. Baptist Memorial Hospital*.[241] Plaintiff Karen Sullivan sued her former employer for defamation, relying on the theory of compelled self-publication.[242] The sole issue before the court was

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235 Davis v. Bd. of County Comm'rs, 987 P.2d 1172 (N.M. Ct. App. 1999).

236 *Id.* at 1175.

237 *Id.* at 1175-77.

238 *Id.* at 1176.

239 *Id.* at 1181-82.

240 *Id.* at 1182.

241 Sullivan v. Baptist Mem'l Hosp., 995 S.W.2d 569 (Tenn. 1999).

242 *Id.* at 541. Defamation generally requires that the defendant communicate a defamatory statement to a third party – that is, to someone other than the plaintiff. RESTATEMENT (SECOND) OF TORTS § 558 (1977); RODNEY A. SMOLLA, LAW OF DEFAMATION §§ 4.12[1], 15.02[1] (1994). Communication to a third party is an essential element of most defamation claims. KEETON ET AL., *supra* note 30 § 113, at 197. Under the theory of compelled self-publication, however, an employee who is fired for defamatory reasons may sue her former employer if the employee is compelled to tell a prospective employer why she lost her job. The former employer may be liable even though it communicated the statement directly to the plaintiff and to no one else. *See, e.g.*, Lewis v. Equitable Life Assurance Soc'y, 389 N.W.2d 876, 889-90 (Minn. 1986); McKinney v. County of Santa Clara, 168 Cal. Rptr. 89, 94-95 (Cal. Ct. App. 1980). For detailed discussion of compelled self-publication defamation, *see generally* Cooper, *supra* note 2; Louis B. Eble, *Self-Publication Defamation: Employee Right or Employee Burden?*, 47 BAYLOR L. REV. 745 (1995); Howard J. Siegel, *Self-Publication: Defamation Within the Employment Context*, 26 ST. MARY'S L.J. 1 (1994); Deanna J. Mouser, *Self-*

whether an employee could satisfy the publication element of defamation when the employee, rather than her employer, disclosed to a prospective employer defamatory reasons for termination.[243] In rejecting the compelled self-publication theory, the court discussed the Tennessee reference immunity statute as evidence of policy concerns weighing in favor of rejecting the doctrine of compelled self-publication.[244] The court expressed concern that recognition of the doctrine would require employers to conduct investigations to ensure accurate conclusions about termination, and a requirement of investigation would compromise employment at will in Tennessee.[245] To support this point, the court noted that the immunity statute requires more than "mere negligence" to rebut the presumption of the employer's good faith.[246] The court reasoned that if an employer could not be liable for negligently communicating false defamatory information regarding an employee, the employer could not be liable when a former employee self-published the same information.[247] Consequently, the state supreme court reinstated the trial court's grant of summary judgment in the case.

Nothing in the *Sullivan* opinion, however, indicates that the hospital raised the statute as a defense to Sullivan's defamation claim. Nor was the statute central to the result in the case. Because *Sullivan* addressed a narrow issue, broader questions of the interpretation of the statute and its reach and effectiveness await later cases. In addition, the case did not present an opportunity to address the statute's relationship to the common law in a case based on a reference by the employer rather than employee self-publication.

Maryland

Defendants in three cases in Maryland asserted the reference immunity statute defense. A federal district court sitting in diversity jurisdiction and applying Maryland law decided the first case, *Deutsch v. Chesapeake Center*.[248] In that case, Rev. William Deutsch and his wife Elaine sued the Synod of the Mid-Atlantic of the Presbyterian Church and the Synod's Executive Director, Rev. Dr. Carroll Jenkins, after being terminated for "racist behavior and sexual harassment."[249] Rev. and

Publication Defamation and the Employment Relationship, 13 INDUS. REL. L.J. 241 (1991/1992).

243 *Id.* at 572.

244 *Id.* at 574-75.

245 *Id.*

246 *Id.*

247 *Id.* at 575.

248 Deutsch v. Chesapeake Ctr., 27 F. Supp. 2d 642 (D. Md. 1998).

249 *Id.* at 643. Apparently, Rev. Deutsch committed the alleged misconduct. Mrs. Deutsch was terminated because she "was 'second in command and had to share responsibility.'" *Id.*

Mrs. Deutsch had been employed as Director and Food Service Director, respectively, of the church's Chesapeake Center.

After Chesapeake Center terminated him, Rev. Deutsch applied for a position as church pastor. Rev. Deutsch's employment papers included a form authorizing any previous employer to release to prospective employers relevant information related to sexual misconduct. When contacted by the prospective employer, Dr. Jenkins stated, "off the record," that the Chesapeake Center terminated Rev. Deutsch "because of difficulties in the areas of sexual harassment and racial discrimination."[250] The Synod also provided Rev. and Mrs. Deutsch written explanations for their discharge and the opportunity to respond to the Synod's Executive Committee. However, the Deutsches did not make any presentation to the Synod, and instead brought suit for breach of contract and defamation.

The court granted summary judgment in favor of the defendants, applying both the common law conditional privilege and the statutory privilege of Maryland's reference immunity statute. Holding that the plaintiffs' defamation claims were "clearly barred" by the common law privilege, the court also held that the plaintiffs failed to make the necessary showing, by clear and convincing evidence, to rebut the statute's presumption of good faith on the part of the employer.[251] The court also emphasized the strong public policy behind the reference immunity statute, noting:

> the statute in question (§ 5-423) sets forth a vital public policy of Maryland. In a world in which employers face almost insurmountable, and dreadfully costly, hurdles trying to discharge an employee, due to the arsenal of administrative and judicial artillery – including suits such as this – that former employees can bring against them, it is vital that they be allowed the latitude afforded them by Maryland's statutory presumption of good faith in giving and gathering references about prospective employees before hiring them.[252]

The Maryland statute also figured prominently in a decision of a Kansas federal district court applying Maryland law in *Boe v. Allied-Signal Inc.*[253] When Douglas Boe, a former employee of AlliedSignal, applied for a position with the Securities and Exchange Commission ("SEC"), the SEC notified him that he had been recommended for ap-

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250 *Id.* at 644.

251 *Id.* at 645.

252 *Id.* at 645-46 (citations omitted).

253 Boe v. AlliedSignal Inc., 131 F. Supp. 2d 1197 (D. Kan. 2001).

pointment, pending reference and background checks. However, after talking with Richard Wallman, AlliedSignal's Chief Financial Officer, the SEC rescinded the recommendation. Speaking of Boe's performance at AlliedSignal, Wallman told an SEC employee that Boe "sometimes did good work, but it was inconsistent."[254] Wallman also added, "Then I should say no comment," and "What does that tell you?"[255] Based on Wallman's statements, Boe sued AlliedSignal, alleging tortious interference with a business relationship and defamation.[256]

As Chief Financial Officer, Wallman did not have direct knowledge of Boe's performance; any knowledge of Boe's work would have been based on performance evaluations and reports from Boe's superiors.[257] Wallman's comments also violated company policy, which provided only for "name, rank and serial number" references.[258] Boe also emphasized that he had reported to company officials numerous instances of alleged improper accounting practices before AlliedSignal fired him.[259] According to Boe, senior executives directed these entries in order to satisfy earnings goals and ensure that they would collect bonuses.[260] Boe asserted that Wallman, a senior executive who received a bonus based on earnings, had an incentive to prevent Boe from obtaining a job with the SEC, where Boe could initiate an investigation of AlliedSignal's accounting practices.[261]

The court applied Maryland law to the reference-based claims because Boe was living in Maryland when he applied for employment with the SEC.[262] Relying on the Maryland job reference immunity statute, the court granted summary judgment dismissing Boe's claims for defamation and tortious interference with a business relationship.[263] Seeking guidance from *Deutsch v. Chesapeake Center*,[264] the court emphasized "the importance that Maryland courts have placed on the presumption of good faith found in § 5-423 of the Annotated Code of Maryland."[265] Noting that the statute immunizes employers from liability for references in the

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254 *Id.* at 1201.

255 *Id.*

256 Boe's lawsuit also challenged his termination and included claims of disability discrimination and retaliatory discharge under state and federal law, breach of public policy, and intentional infliction of emotional distress. *Id.* at 1199. The court applied Kansas law to the state law claims related to the discharge and Maryland law to the claims for defamation and tortious interference with business relations. *Id.* at 1206.

257 *Id.* at 1201-02.

258 *Id.* at 1202.

259 *Id.* at 1200.

260 *Id.*

261 *Id.* at 1202, 1207.

262 *Id.* at 1206.

263 *Id.* at 1208.

264 *See* discussion *supra* pp. 53-54.

265 *Id.* at 1207.

absence of clear and convincing evidence of actual malice, or intentional or reckless disclosure of false information, the court concluded that Boe failed to present clear and convincing evidence of such conduct by AlliedSignal.[266] The court found that Boe presented no evidence to show that Wallman's comment that Boe "sometimes did good work but it was inconsistent" was made recklessly.[267] The court also found implausible Boe's theory that the statements "[t]hen I should say no comment" and "[w]hat does that tell you?" were maliciously motivated by Wallman's fear that Boe would get a job for the SEC and initiate an investigation against AlliedSignal.[268] Finally, the court rejected Boe's argument that adequate performance evaluations and violation of the policy restricting reference information provided clear and convincing evidence of malice or recklessness.[269] Accordingly, AlliedSignal was protected by the immunity statute's presumption of good faith, and Boe lost the case on summary judgment.[270]

In a Maryland state court case, *Darvish v. Gohari,*[271] the defendant asserted the reference immunity statute as a defense in a defamation case. Shahriar Gohari sued John Darvish in connection with Gohari's efforts to obtain approval from the Central Atlantic Toyota Distributors, Inc. ("CATD") for the purchase of a Toyota dealership. Gohari worked for Darvish's Darcars automotive group from 1987 until he quit in 1996. In a meeting with representatives of CATD, Darvish allegedly made the following statements: "(1) [Mr. Gohari] 'did not have the experience or background to be considered qualified to operate a dealership;' (2) 'Mr. Gohari had suddenly left the DARCARS organization several months ago in an unprofessional manner and with no notice'; and (3) 'there was a questionable financial manipulation by Mr. Gohari to inflate his com-

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266 The court looked to Maryland case law for the definitions of "actual malice" and "recklessness."

> "Actual malice" can be established by showing that: a defamatory statement was a calculated falsehood or lie "knowingly and deliberately published[;]" . . . a defamatory statement was so inherently improbable that only a reckless person would have put it in circulation; or the publisher had obvious reasons to distrust the accuracy of the alleged defamatory statement or the reliability of the source of the statement. (citation omitted).
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> . . . "'Reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.'" (citations omitted).

Id. at 1207.

267 *Id.*

268 *Id.*

269 *Id.* at 1207-08.

270 *Id.* at 1208.

271 Darvish v. Gohari, 745 A.2d 1134 (Md. Ct. Spec. App. 2000).

pensation.'"[272] Darvish also sent a confirming letter to CATD containing similar statements regarding Gohari.[273]

Darvish's defenses included the common law as well as the statutory privilege. Gohari argued that neither the common law conditional privilege nor the reference immunity applied because CATD was not a prospective employer. Darvish contended that both privileges applied because the communications arose out of an employer-employee relationship.[274]

Regarding the Maryland reference immunity statute, the court agreed with Gohari. Because CATD was a prospective franchisor rather than a prospective employer, the statements by Darvish "[did] not fall within the letter of this statutory protection."[275] The court noted, however, that the reference immunity statute "did not abrogate the common law."[276] Consequently, the court held that the common law privilege protected Darvish's statements and remanded the case for consideration of whether Gohari could prove that Darvish had abused the qualified privilege.[277]

Iowa

Finally, a recent job reference case in Iowa, *Lowe v. Todd's Flying Service, Inc.*[278] briefly discussed that state's reference immunity statute. Lowe was a pilot who had worked for Todd's Flying Service. When Lowe later applied for a job with DHL Airways, Allan Todd of Todd's Flying Service allegedly made a number of disparaging comments when asked for a reference regarding Lowe.[279] Based on the allegedly derogatory statements, Lowe sued Todd for defamation and interference with prospective business advantage. Unfortunately for Lowe, DHL's application process included a release form that relieved any former employers of liability for providing references, and Lowe had signed the release. Therefore, Lowe argued that Todd's statements were intentional and malicious and that it was against public policy for a release to immunize

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272 *Id.* at 1136.

273 *Id.* at 1137.

274 *Id.*

275 *Id.* at 1139.

276 *Id.*

277 *Id.* at 1140.

278 Lowe v. Todd's Flying Serv., Inc., No. 0-694/99-0708, 2001 Iowa App. LEXIS 53 (Jan. 24, 2001) (unpublished opinion).

279 Todd, the former employer, allegedly made the following comments to DHL Airways when giving a reference regarding Lowe: "1) Lowe quit without notice, 2) Lowe left him high and dry, 3) Lowe's work quality was poor, 4) Lowe's attendance was poor, 5) Lowe's attitude was poor, 6) Lowe's employment period was approximately two to three months in duration, and 7) Lowe refused a drug test." *Id.* at *3.

such conduct.[280] Specifically, Lowe contended that Iowa's reference immunity statute did not provide immunity for information provided with malice.[281] However, Lowe failed to raise the issue before the trial court. Consequently, the appellate court did not address the statutory argument, and there was no opportunity for the court to interpret the Iowa reference immunity statute.

C. PATTERNS IN THE CASE LAW

The following analysis must begin with a caveat: generalizations from the existing case law necessarily are preliminary. With only nine reported cases as of this writing, any analysis of the "body" of reference immunity statute case law has obvious limitations. Only one of the nine cases is a decision of a state supreme court, and that case addresses self-publication defamation by the employee rather than a communication by an employer.[282] Notwithstanding these limitations, the early cases shed light—even if not particularly bright light—on how courts may interpret the statutes in future cases.

Judicial analysis of the relationship between the statutes and the common law should be a key issue as the cases unfold. In cases to date, courts analyze the statutes as codifications of common law privileges.[283] The statutes can supplement the common law, providing employers an additional or alternative means of asserting that references are protected by privilege.[284] Thus, courts have applied both the common law and statutory privileges to immunize defendants from liability. An employer who does not meet the requirements of the statute may be able to rely on

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280 *Id.* at *9.

281 Iowa Code § 91B.2 provides immunity unless the employer "acted unreasonably in providing the work-related information." IOWA CODE ANN. § 91B.1 (West Supp. 2001). Lowe relied on the following definition of unreasonable conduct under the statute: "The work-related information is not relevant to the inquiry being made, is provided with malice, or is provided with no good faith belief that it is true." IOWA CODE ANN. § 91B.2.c (West Supp. 2001).

282 Sullivan v. Baptist Mem'l Hosp., 995 S.W.2d 569 (Tenn. 1999). *See* discussion *supra*, at pp. 52-53.

283 *See* Linafelt v. Beverly Enterprises-Florida, Inc., 745 So.2d 386, 388; (Fla. Dist. Ct. App.1999) (describing statute as "the Legislature's codification of the common law"); Thomas v. Tampa Bay Downs, Inc., 761 So.2d 401, 405 (Fla. Dist. Ct. 2000) ("legislative codification of the common law of qualified privilege"); Davis v. Bd. of County Comm'rs, 987 P.2d 1172, 1182 (N.M. Ct. App. 1999) (observing that "[t]he statute would appear to track much of the common-law privilege relating to defamation and good-faith comments in the employment context").

284 *See* Deutsch v. Chesapeake Ctr, 27 F. Supp. 2d 642, 645 (D. Md.1998); *Davis*, 987 P.2d at 1181 (observing that "[i]n addition to the common law, New Mexico has recently added a statutory privilege"); Bernofsky v. Adm'rs of Tulane Educ. Fund, No. 98-1792, 2000 U.S. Dist. LEXIS 5561 (E.D. La. Apr. 18, 2000), *aff'd* 253 F.3d 700 (5th Cir. 2001) (granting summary judgment apparently on the grounds of both common law and statutory privilege).

the common law as a fallback position.[285] None of the current cases interprets an immunity statute as providing the sole ground for affirmative defense in a reference case.

Where statutes require plaintiffs to defeat the privilege with clear and convincing evidence, the evidentiary standard figures prominently in courts' analyses. Courts emphasize that the statutory privilege imposes a higher evidentiary burden on plaintiffs than the burden borne by plaintiffs under the common law.[286] Should courts determine that employers may invoke both the statutory and common law privileges, a statute's clear and convincing evidence standard may encourage employers to choose the statute as their first line of defense.

Where courts apply the reference immunity statute and the common law privilege, conflicting evidentiary standards may confuse juries. An employer's claims of privilege most likely will be based on one set of facts. Jurors will be required to apply differing standards of proof in evaluating the facts. When assessing facts relating to the statutory privilege, jurors will apply the clear and convincing evidence test. Conversely, when assessing facts relating to the common law privilege, jurors will apply the preponderance of the evidence standard. Judges will need to ensure that jurors understand the differing burdens of proof and apply the correct standard depending on whether the claimed privilege is based on the statute or the common law.[287] In this regard, the statutes add confusion and complexity to job reference litigation.

The statutory privilege also requires that the circumstances of the particular case fall within the letter of the statute with regard to the nature of the communication or the person to whom the communication is made. In Florida, the statute covers statements about "job performance," while other workplace statements are not protected by the statutory privilege.[288] Under Maryland law, a statement regarding job performance was not protected by the statute when the former employer communicated with a franchising organization rather than a "prospective employer."[289] Employers who lose the statutory privilege because of noncompliance with the terms, however, may claim the protection of the common law qualified privilege.[290]

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285 *See* Darvish v. Gohari, 745 A.2d 1134, 1139 (Md. Ct. Spec. App. 2000)(finding that communication to franchisor was not protected by the statute because franchisor was not a "prospective employer," and applied common law qualified privilege to communication).

286 *See Linafelt*, 745 So. 2d at 389-90; *Deutsch*, 27 F. Supp. 2d at 645-46.

287 *See Linafelt*, 745 So. 2d at 389-90 (finding that jury rendered verdict without considering whether plaintiff had met the burden of proof by clear and convincing evidence).

288 *See Thomas*, 761 So. 2d 404-05 (finding a computerized report sent to members of racetrack security bureau matter of common law privilege and statement to prospective employer was within category of "comments about job performance" under the statute).

289 *Darvish*, 745 A.2d at 1134.

290 *See id.* at 1139-40.

Based on the early cases, it appears that reference immunity statutes may aid employers in obtaining summary disposition of defamation and other communication-based claims in the workplace. Summary disposition is more likely under a clear and convincing standard of proof than under a preponderance of the evidence test. However, in cases involving factual disputes regarding whether statements were made or the content of statements made, those issues will remain for trial. Plaintiffs also may succeed in raising factual issues regarding whether their employers' conduct constituted good faith.

Like their existing common law privilege counterparts, the reference immunity statutes provide conditional protection when the employer is sued. However, given that the common law privilege did not dissuade employers from using the "name, rank and serial number" approach, there is little reason to believe codification of the privilege magically will transform perceptions of employers—or their advisers—and make them comfortable in giving references. In addition, because many employers prefer to avoid lawsuits altogether rather than relying on immunity to protect them once they are sued, the qualified immunity does not adequately address their concerns. While this problem is not unique to reference immunity statutes, the lingering threat of being sued —even with the protection of statutory qualified immunity—may keep many employers tied to "name, rank and serial number" policies. In that event, the statutes inevitably will fail as a catalyst for changing reference practices.

V. THINKING OUTSIDE THE LEGISLATIVE BOX: BEYOND STATUTES AS THE PRIMARY MEANS OF REFORMING JOB REFERENCE LAW, POLICIES AND PRACTICES

A. CHANGING EMPLOYERS' PERCEPTIONS AND VALUES

The reference situation presents a textbook "prisoner's dilemma" scenario, resulting in a stalemate between employers who need information and those who withhold information to protect themselves from lawsuits.[291] Like persons caught in the classic prisoner's dilemma, employers in the reference context must choose between acting in their individual best interests or acting for the benefit of themselves and other employers.

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291 *See* Adler & Peirce, *supra* note 2, at 1426. To explain the prisoner's dilemma concept, Adler and Peirce quote a definition from a negotiation text: "prisoners [sic] dilemma is simply an abstract formulation of some very common . . . situations in which what is best for each person individually leads to mutual [lack of cooperation,] whereas everyone would have been better off with mutual cooperation." *Id.* at n.231 (citing Robert Axelrod, *The Problem of Cooperation, in* NEGOTIATION: READINGS, EXERCISES, AND CASES 71-79 (Roy Lewicki et al., eds. 1983)).

The individual best interest is served by obtaining references yet refusing to provide them. By obtaining references, employers gain information in the hiring process that may assist them in avoiding claims for negligent hiring. Alternatively, if reference information warrants additional caution, employers who receive references may undertake additional supervision and monitoring of new employees, thereby reducing the risk of harm or potential claims for negligent supervision. Employers who follow "name, rank and serial number" policies minimize the risk of lawsuits based on negative or misleading references. While this situation may appear to serve individual employers' interests, the lack of mutual exchange of information impedes the flow of valuable information in the hiring process.

Conversely, mutual cooperation serves the interest of both parties. Mutual cooperation occurs when each employer who seeks references receives references in return. This mutual exchange of information benefits both parties, although each employer bears some risk of suit. The reference provider risks a lawsuit if she provides a negative or misleading reference. The employer who obtains a reference may be sued for negligent hiring if she fails to adequately investigate the information she receives. In the mutual cooperation scenario, there is mutual benefit and risk for both parties (although employers perhaps may bear a larger litigation risk in giving references rather than in receiving them).

The least favorable outcome results where only one party provides references while the other does not. In that situation, the employer who receives the information is a "free-rider" who benefits from receiving references but who does not take on any of the risks inherent in providing them.[292] The free-rider can make informed hiring decisions – thereby increasing the efficiency of the hiring process *and* receiving information sufficient to avoid negligent hiring claims – while maintaining a "name, rank and serial number" policy to avoid lawsuits.[293]

Legislation alone is an ineffective means of breaking this stalemate. The conventional wisdom of the workplace promotes the following ideas

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292 Adler & Peirce, *supra* note 2, at 1426.

293 For further discussion of the prisoner's dilemma and free rider concepts in the context of job references, see the work of Professors Adler & Peirce, *supra* note 2, at 1425-27. For another discussion of the free-rider problem in job references, *see* STEVEN L. WILLBORN ET AL., EMPLOYMENT LAW CASES AND MATERIALS 361 (2d ed. 1998). Describing the free rider problem, the authors write:

> The risks that a candidly negative reference will be found defamatory fall on the old employer, while the benefits accrue to the interviewing employer. As a result, a policy of refusing to give references may be wise for each individual employer, even though it would harm the public interest by limiting the flow of valuable information about prospective employees.

Id.

that encourage "name, rank and serial number" and neutral reference policies:

- employers place themselves at risk by giving references;
- wise and cautious employers will avoid this risk at all cost; and
- risks of providing references outweigh any benefits of receiving them.

As long as these beliefs shape employers' job reference strategies, we should not expect to see a large scale change in reference policies, even if all fifty states and the District of Columbia enact reference immunity legislation. To be most effective, shifts in workplace culture, attitudes and norms must supplement legislation.

Change in three areas could serve as a catalyst for adoption of open reference policies and practices. First, because fear of litigation is the primary impetus for adopting "name, rank and serial number" and neutral reference policies, changing employers' perception of the risk of reference-based litigation must be a fundamental objective of reform efforts. Notwithstanding the prevailing perceptions based on a limited number of sensational cases, the actual number of reference cases is small, and plaintiffs frequently lose those cases.[294] Employers need this information to shape reference policies based on actual risk levels rather than perceived and inflated notions of risk. To this end, human resource, legal and general interest media should inform employers of studies regarding the actual number of reference lawsuits and the relatively low success rates of plaintiffs in those cases.[295] Media reports could include more balanced coverage, so that reports of the occasional high profile, large verdict case can share the stage with reports of verdicts reduced or overturned on appeal. If employers understand that the litigation risk is small, reference policies no longer will be shaped primarily by the fear of being sued.[296]

Closely related to changing perceptions of risk is the second shift in workplace thinking: accepting the small risk of reference litigation as a cost of doing business.[297] Knowing that the chance of being sued is a

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294 *See supra* note 7 and accompanying text.

295 *See* discussion *infra* Part V.B.

296 Arguably, reference immunity statutes also might play a role in correcting employers' perceptions of the risk of being sued. *See* WILLBORN ET AL., *supra* note 293, at 362 (arguing that if employers' refusal to give references is based on an unrealistic fear of being sued, reference immunity "statutes may increase reference-giving by correcting employer misperceptions about their exposure to defamation liability, even if [the statutes] do not change the actual liability standard at all.").

297 *See* Sixel, *supra* note 90, at 1 ("Probably the best thing is for employers to step up to the plate and accept the risk of giving out references as the cost of doing business . . . . It's to

small one, employers will be more willing to accept the minimal risk involved in providing references so that free flowing, useful communication can replace silence as the model reference strategy in the workplace.

The third proposed shift focuses on the unity of self-interest and mutual benefit in the reference-based "prisoner's dilemma." As emphasis moves from the risks of reference-giving to the benefits of open communication regarding prospective employees, the workplace can return to the model of providing references "upon request" as a matter of professional courtesy, mutual obligation and mutual benefit among employers. This shift requires a workplace culture that recognizes and values the way in which reference information assists employers in making good hiring decisions that in turn increase efficiency and safety in the workplace. When these benefits are balanced against the modest litigation risk of providing references, employers will recognize that both self-interest and mutual interest are served by giving useful references rather than neutral or "name, rank and serial number" responses. Moreover, because the litigation risk is small, self-interest is *not* best served by refraining from providing references. Instead, employers who adhere to "name, rank and serial number" do themselves a disservice. While these employers may avoid the limited risk of being sued, they face an intangible, but more substantial loss in the process of making hiring decisions. Information needed to assess prospective employees will not be available to them. As one writer has observed, "After all, what goes around, comes around. When [a] company seeks a recommendation about someone it would like to hire, the reference from her last employer may be as unhelpful as the references [the] company gives other employers."[298]

Individual businesses and employers collectively will be better served if "what goes around" in references is candid, useful, and meaningful information regarding workers' job performance. With changes in the reference paradigm, mutual cooperation in references would be recognized as serving the individual and collective interests of employers. In addition, employees who were previously unable to obtain references under the "name, rank and serial number" model will benefit from opening the channels of communication.

B. LEGISLATION AND EDUCATION: COMBINING STATUTES AND PUBLIC INFORMATION CAMPAIGNS

Notwithstanding flaws in the statutory scheme, legislation remains the centerpiece of efforts to reform job reference law, policies and prac-

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the advantage of the community to get the information out and there probably wouldn't be a big rush to the courthouse if the employers gave out references.") (quoting T.J. Wray, an employment lawyer with Fulbright & Jaworski in Houston).

298 Fray-Witzer, *supra* note 11, at 31.

tices. Using statutes as the sole mechanism for reform, however, is unlikely to result in meaningful changes in employers' approaches to references. Even a flawless statute, enacted in every state, would be unlikely to end the reference stalemate without public awareness of the law. Accordingly, the statutes should be part of a multi-pronged effort to educate and inform employers about the low risk of being sued, the existence of the immunity statutes, and the legal rules that apply to providing references.

An effective education campaign will require the efforts of legislators, the employment law bar, human resource organizations, and other organizations that provide resources regarding personnel and employment law issues.[s] On the legislative front, sponsoring legislators should publicize the enactment or amendment of immunity statutes in their states. The employment law bar, human resource organizations and other resource groups should disseminate information to members, clients and the public via conferences, seminars, newsletters, the trade press and the general interest media. Media involvement is critical to reference reform efforts. Over the years, both the trade press and popular press have highlighted job reference horror stories. With numerous reports chronicling a rising number of workplace defamation cases, large verdicts, and the escalating risk of litigation,[299] the press played a key role in transforming "name, rank and serial number" reference policies from "urban legend" to workplace reality.[300] To reach businesses with limited legal resources, a broad-based, diversified, and multilevel information process is essential. With information available through a variety of reliable and publicly available resources, there is an increased opportunity to reach small businesses that may not have ongoing legal representation or information regarding job reference laws.

The combination of statutory protection and education will strengthen the effectiveness of the statutes by arming employers with information needed to make them comfortable in sharing reference information.[301] Also, to the extent that many statutes have requirements that

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299 *See, e.g.*, sources cited *supra* note 5.

300 *See* Long, *supra* note 12, at 226-27. Regarding the perception that employers risk defamation suits if they give references, Long observes:

> Whatever the reality, employers apparently *believe* that defamation lawsuits are a deterrent to providing references. Like the story about Jimmy Hoffa being buried under the end zone at Giants Stadium, the belief is not unlike urban folklore. The stories have been repeated so often that they are now accepted as being true. Until this belief is addressed adequately, the problem is likely to continue.

Id. (emphasis in original).

301 *See* Long, *supra* note 12, at 228. Long calls for "a combination of legislative action and grass roots effort[s]" using legislatures and "employer groups" in coordinated efforts to inform employers of the actual risks of providing references and how to reduce any such risk. *Id.* While Long focuses primarily on "employer groups" as the persons with the primary

may trap the unwary employer, information is important to maximize the protection afforded by the statute.[302] Finally, education and information should be used in a positive, proactive manner. With education, employers can provide references that not only will avoid any legal challenges but also will be useful and constructive, to the mutual benefit of all in the workplace.[303]

VI. CONCLUSION

Since the mid-1990s, the majority of states enacted reference immunity legislation. The objective of the legislation is two-fold: to assuage employers' fears of being sued over job references, and, in turn, to encourage employers to abandon "no comment" and "name, rank and serial number" reference policies. Although most states adopted reference immunity statutes, the conventional wisdom and advice in the workplace remains unchanged. Thus far, immunity statutes appear to have little, if any, impact on employers' practices or the advice given by the lawyers and human resource professionals who counsel employers. Nor is it likely that the statutes will encourage a significant change in reference practices in the future, in light of the language of the statutes and the statutes' duplication of existing legal standards – standards that have been resoundingly ineffective in deterring the use of "name, rank and serial number" policies.[304]

The current generation of reference immunity statutes also creates new problems. Rather than simplifying and clarifying the law of job

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responsibility for the education campaign, his proposals also acknowledge that legislators should play a role in the informational process. *Id.* at 226-28; *see also* Schainblatt, *supra* note 15, at 744-45 (observing that "[a]s employers learn more about the protection afforded by the new law, their anxieties about providing reference information may lessen."); Cooper, *supra* note 2, at 328.

302 For example, employers may forfeit the immunity under the technical requirements of many statutes. In those states, it is not enough to give employers notice that the statutes exist. Employers also must be aware of the steps to be taken to qualify for the immunity, and they must know that failure to do so will leave them without the statute's protection.

303 *See* Long, *supra* note 12, at 227 (suggesting that statutes by themselves will not change current reference practices, Long calls for "employer groups" to initiate an educational campaign to correct the misconception of the risk of being sued and to "coordinate an education program that will teach employers how to avoid [reference] suits").

304 As Professor Verkerke concluded:

> These enactments vary somewhat in their specifics, but none seriously modifies the existing structure of liability under the common law. Employers remain subject to defamation suit for falsely negative references, and the legislation typically codifies the existence of a conditional privilege for providing reference information. It remains to be seen whether such provisions will significantly increase the burden on plaintiffs attempting to prove abuse of the privilege. However, a plain reading of the language most commonly used in these statutes suggests that dramatic change is unlikely.

Verkerke, *supra* note 2, at 132.

references, the statutes complicate and confuse matters. Because the statutes generally are not the exclusive remedy for job reference claims, duplication of claims and defenses is possible and likely. Employers remain open to common law as well as statutory liability. Employees also must contend with common law defenses; they cannot look to the statutes alone for clear rules regarding privileges in reference claims. In addition, the most effective provisions for protecting employers – fee-shifting and requiring plaintiffs to prove loss of immunity with clear and convincing evidence—are draconian measures that deter even meritorious claims. In short, today's reference immunity statutes are a politically popular—yet problematic and ineffective—response to calls for more openness in job references.

These concerns notwithstanding, the reality is that reference immunity legislation has become a common feature of state regulation of the employment relationship. Addressing the reference problem with legislation alone, however, will not be sufficient to bring about significant changes in reference practices. At the heart of the problem lie matters not readily amenable to a solely legislative fix: changing human behavior in the face of widely held misconceptions of risk and widespread discounting of the mutual benefit in having open reference practices. Legal reforms also should be combined with efforts to educate employers and to influence the development of a new workplace culture in which employers exchange honest and meaningful references, knowing that the risk of lawsuit is small and the benefits of free flowing communication reach employers, employees and the public. Without a coordinated effort to disseminate information and change employers' perceptions, immunity legislation will be just a footnote in a futile battle against "name, rank and serial number" practices.

APPENDIX
STATE REFERENCE IMMUNITY STATUTES
AS OF JANUARY 2002[305]

State	Code Section	Year Enacted	Standard of Proof (if stated in statute)[306]
Alaska	Alaska Stat. § 09.65.160 (Michie 2000)	1993	Preponderance
Arizona	Ariz. Rev. Stat. Ann. § 23-1361 (West Supp. 2001)	1996	
Arkansas	Ark. Code Ann. § 11-3-204 (Michie 2000)	1999	Preponderance
California	Cal. Civ. Code § 47c (West Supp. 2001)	1994[307]	
Colorado	Colo. Rev. Stat. Ann. § 8-2-114 (West Supp. 2001)	1992, 1999[308]	Preponderance
Delaware	Del. Code. Ann. tit. 19, § 709 (Supp. 2000)	1996[309]	
Florida	Fla. Stat. Ann. § 768.095 (West Supp. 2002)	1991[310]	Clear and convincing
Georgia	Ga. Code Ann. § 34-1-4 (Michie 2001)	1993	Preponderance
Hawaii	Haw. Rev. Stat. § 663-1.95 (Supp. 2000)	1998	Preponderance
Idaho	Idaho Code § 44-201 (Michie 1997)	1996	Clear and convincing
Illinois	745 Ill. Comp. Stat. Ann. 46/10 et seq. (West Supp. 2001)	1996	Preponderance
Indiana	Ind. Code. Ann. § 22-5-3-1 (Michie 1997)	1995	Preponderance
Iowa	Iowa Code Ann. § 91B.2 (West Supp. 2001)	1997	

305 This table updates information originally compiled in Cooper, *supra* note 2, at 335-36.

306 Where statutes do not expressly state the burden of proof, the preponderance of the evidence standard applies. *See* discussion *supra* note 88.

307 The California legislature amended Civil Code § 47c in 1994 to expressly cover employment references. *See* CAL. CIV. CODE § 47c (West Supp. 2001), Historical and Statutory Notes; Margaret Hart Edwards, *Job References: Legislature Amends Civil Code to Protect Communications About Applicants' Performance or Qualifications*, CAL. BUS. L. REPORTER, March 1995, at 271.

308 The Colorado legislature repealed and reenacted the reference immunity statute in 1999. *See* COLO. REV. STAT. ANN. § 8-2-114 (West Supp. 2001), Historical and Statutory Notes.

309 Originally numbered § 708, the section was re-designated as § 709 in 1997. *See* DEL. CODE. ANN. tit. 19, § 709 (Supp. 2000), Revisor's note.

310 Amended in 1999. The 1999 amendments made substantial changes in the language of the Florida statute. *See* FLA. STAT. ANN. § 768.095 (West Supp. 2002), Historical and Statutory Notes.

Kansas	Kan. Stat. Ann. § 44-119a (2000)	1995	
Louisiana	La. Rev. Stat. Ann. § 23:291 (West 1998)	1995	Preponderance
Maine	Me. Rev. Stat. Ann. tit. 26, § 598 (West Supp. 2001)	1995	Clear and convincing
Maryland	Md. Code Ann., Cts. & Jud. Proc. § 5-423 (1998)	1996	Clear and convincing
Michigan	Mich. Comp. Laws Ann. § 423.452 (West 2001)	1996	Preponderance
Missouri	Mo. Rev. Stat. § 290.152 (2000)	1999	
Montana	Mont. Code. Ann. § 27-1-737 (2000)	1999	
Nevada	Nev. Rev. Stat. Ann. § 41.755 (Michie 1999)	1997	
New Mexico	N.M. Stat. Ann. § 50-12-1 (Michie Supp. 2000)	1995	
North Carolina	N.C. Gen. Stat. § 1-539.12 (1999)	1997	Preponderance
North Dakota	N.D. Cent. Code § 34-02-18 (1999 Supp.)	1997	Preponderance
Ohio	Ohio Rev. Code Ann. § 4113.71 (Anderson 2001)	1996	Preponderance
Oklahoma	Okla. Stat. Ann. tit. 40, § 61 (West 1999)	1995	Preponderance
Oregon	Or. Rev. Stat. § 30.178 (1999)	1995	Preponderance
Rhode Island	R.I. Gen. Laws § 28-6.4-1 (2000)	1996	Preponderance
South Carolina	S.C. Code Ann. § 41-1-65 (Law Co-op Supp. 2000)	1996	
South Dakota	S.D. Codified Laws § 60-4-12 (Michie Supp. 2001)	1996	Clear and convincing
Tennessee	Tenn. Code Ann. § 50-1-105 (Supp. 2001)	1995	Preponderance
Texas	Tex. Lab. Code Ann. § 103.001 et seq. (Vernon Supp. 2002)	1999	Clear and convincing
Utah	Utah Code. Ann. § 34-42-1 (1997)	1995	Clear and convincing
Virginia	Va. Code Ann. § 8.01-46.1 (Michie 2000)	2000	Clear and convincing
Wisconsin	Wis. Stat. Ann. § 895.487 (West Supp. 2001)	1996	Clear and convincing
Wyoming	Wyo. Stat. Ann. § 27-1-113 (Michie 2001)	1996[311]	Preponderance

311 Amended in 1999. The amendments substituted the word "employee" and its plural possessive forms for the word "employe" and its plural and possessive forms. *See* WIS. STAT. ANN. § 895.487 (West Supp. 2001), Historical and Statutory Notes.